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Supreme Court of the United States

OCTOBER TERM, 1964

No. 363

LUCY C. SIMONS, PETITIONER,

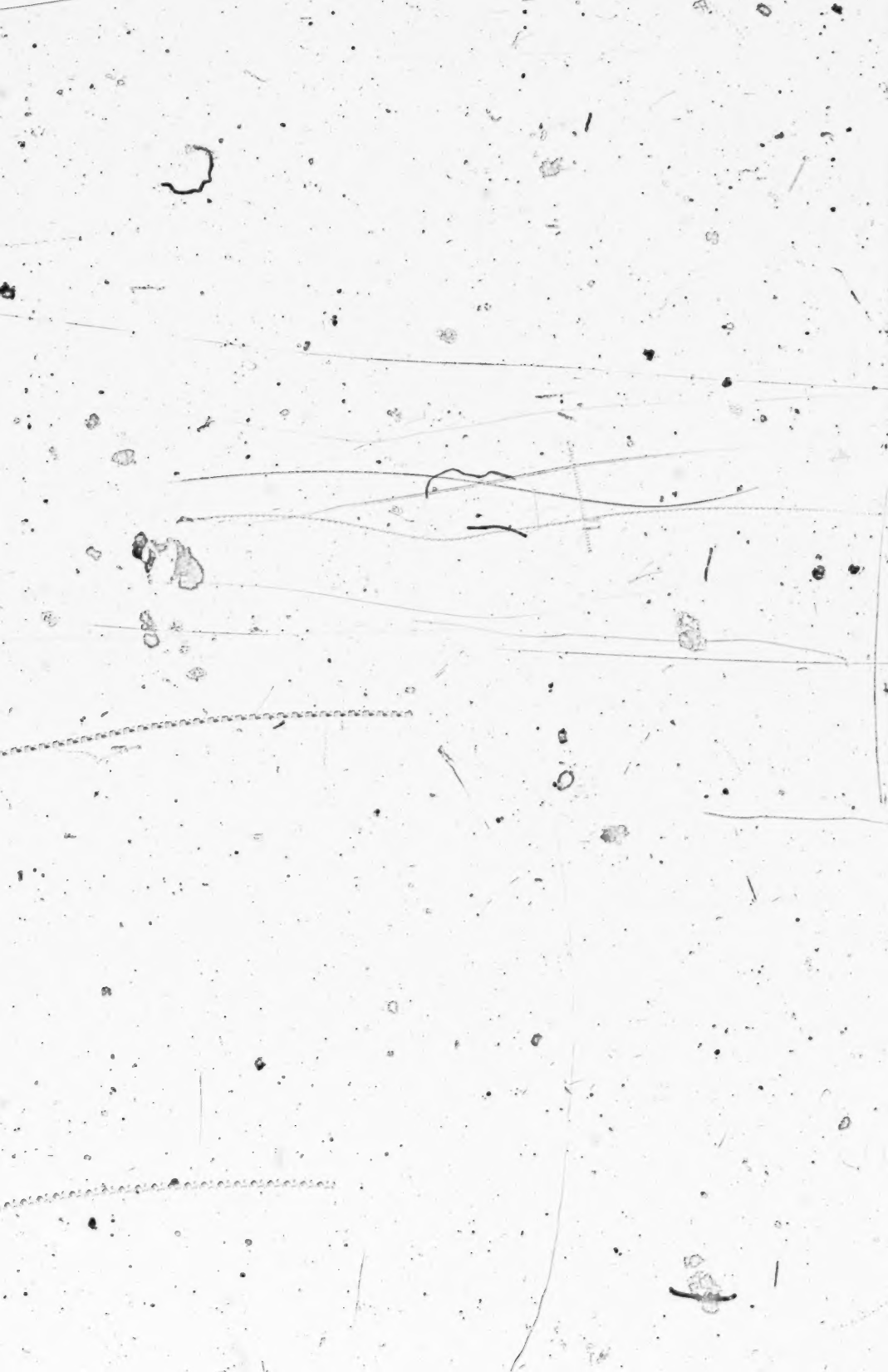
v.

MIAMI BEACH FIRST NATIONAL BANK, ETC.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

PETITION FOR CERTIORARI FILED AUGUST 10, 1964

CERTIORARI GRANTED OCTOBER 19, 1964



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 363

LUCY C. SIMONS, PETITIONER,

v.

MIAMI BEACH FIRST NATIONAL BANK, ETC.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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[fol. 1] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

IN CHANCERY

No. 62C 1980

LUCY C. SIMONS, a widow, Plaintiff,

vs.

MIAMI BEACH FIRST NATIONAL BANK, a banking institution organized and existing under the laws of the United States, with its principal place of business in the City of Miami Beach, Dade County, Florida, as Executor of the Estate of SOL SIMONS, deceased, Defendant.

COMPLAINT—Filed February 23, 1962

Lucy C. Simons, a widow, by and through her undersigned attorneys, files this her complaint in equity against the defendant, Miami Beach First National Bank, a banking institution organized and existing under the laws of the United States, with its principal place of business in the City of Miami Beach, Dade County, Florida, as Executor of the Estate of Sol Simons, deceased, and complaining says:

I.

Plaintiff is a resident of the City of New York, State of New York, and is the widow of Sol Simons, now deceased. Plaintiff is over the age of 21 years and is under no disability.

The defendant, Miami Beach First National Bank, is a banking institution organized and existing under the laws of the United States of America, and has its principal place of business in the City of Miami Beach, Dade County, Florida. Said Bank is the duly appointed and now acting executor of the Estate of Sol Simons, deceased, appointed in certain probate proceedings now pending in the County

Judges Court in and for Dade County, Florida, Probate Case No. 51039-B.

[fol. 2]

II.

Sol Simons, the husband of the plaintiff, died while a resident of the State of New York in the City of New York on the 26th day of October, 1960. His last will and testament was filed for probate in the County Judges Court in and for Dade County, Florida, on the 31st day of October, 1960, and letters testamentary were issued to the defendant, Miami Beach First National Bank, as aforesaid, on the 31st day of October, 1960.

III.

Plaintiff further shows that she has heretofore filed her petition for the settlement and allowance of dower under the laws of the State of Florida, which said petition is still pending and has not as yet been determined by the said County Judges Court.

IV.

The executor, the defendant herein, has filed its petition in the County Judges Court in and for Dade County, Florida, in said probate proceeding 51039-B, in which it has admitted that the said Lucy C. Simons has previously filed or caused to be filed certain documents claiming dower in said estate, but makes the contentions as follows:

That said Lucy C. Simons and Sol Simons were divorced from each other in April, 1952, by virtue of a final decree of divorce entered in chancery action 148,091-E in the Circuit Court of the 11th Judicial Circuit, in and for Dade County, Florida, as shown by a true copy of said sworn petition attached hereto, marked "Exhibit 1" and made a part hereof.

Attached to the petition (Exhibit 1) is a true copy of plaintiff's dismissal without prejudice of a cause previously filed in the United States District Court, Southern District of Florida, Miami Division. This cause is filed in lieu thereof by way of a direct attack in the court which rendered the decree complained of.

[fol. 3] No objection to any claim of dower has been raised by the said executor other than the claim that the plaintiff was not the wife of the said Sol Simons on the date of his death, October 26, 1960.

V.

Plaintiff charges that the alleged divorce decree purportedly entered by the then living, now deceased, Judge Vernon Hawthorne, then a Circuit Judge of the 11th Judicial Circuit, in and for Dade County, Florida, is void and of no force and effect for the following reasons:

In addition to the claim and charge that said divorce decree is itself a nullity and not binding upon this plaintiff in any respect, the divorce action, as above mentioned, was purported to be prosecuted solely upon substitute service by publication. Under the laws of this State, a divorce which is attempted to be procured against a plaintiff such as the plaintiff in this case who was in 1952 and at all times prior thereto and at all times subsequent thereto has been, a resident of the City of New York and State of New York, does not, even if legal, void or destroy or in any way impair a widow's claim for dower. This charge is made both under the provisions of the laws of the State of Florida and the Constitution and under the laws and Constitution of the United States of America.

Plaintiff charges that the said divorce decree, filed on the 30th day of April, 1952, and recorded the first day of May, 1952, in Chancery Order Book 1030, at Page 551, a true copy of which is attached hereto, marked "Exhibit 2" and made a part hereof, shows on its face that it is a void decree and inoperative to cut off the marital status between the parties, in that the basic assumption in the decree was that the case was before the Court on bill of complaint, the defendant's answer and the report of the Special Master in Chancery filed therein, when it clearly appears by reference to the proceedings in said cause 148,091-E that the defendant therein named, Lucy C. Simons, the plaintiff herein, did not file an answer in said [fol. 4] cause and did not appear to be represented of rec-

ord in any respect, and that the Court, therefore, was either misled or was without any jurisdiction or power to find that the Court had jurisdiction over the parties and the cause. The Court did not purport to pass upon the validity of the purported substituted service solely by publication, nor was there any finding made by the Court that the plaintiff had qualified with sufficient residence requirements in the State of Florida to ask for and receive relief in a court of the State of Florida in a divorce action, wherein, in truth and in fact, as hereinafter specifically alleged and set forth, the plaintiff in said cause, as well as the defendant in said divorce cause, were both at the time of the filing of said cause and the entry of the decree, bona fide residents of the City of New York and State of New York.

Plaintiff further shows that as appears from said file, which is by reference made a part of this complaint, the only purported service was the filing of an alleged proof of publication wherein it is shown that the plaintiff in said cause purported to file the proof of publication of a service alleged to be in the Jewish Floridian, a weekly published newspaper in Miami, Dade County, Florida, in which it was purported to show that under date of March 11, 1952 the Clerk of the Circuit Court of Dade County, Florida, issued a notice for substituted service by publication, directed to Lucy C. Simons, Hotel Beacon, 75th Street at Broadway, New York, N.Y., in which it was purported to require the said Lucy C. Simons to appear, answer or plead in the Office of the Clerk of the Circuit Court of Dade County, Florida, on or before the 11th day of April, 1952, or otherwise judgment by default would be taken against the defendant.

Plaintiff further shows that in the complaint filed in said cause, the plaintiff alleged that he was a bona fide resident of Dade County, Florida; that he had been a bona fide resident of Dade County, Florida, for more than 90 days immediately preceding the filing of the bill of complaint; that [fol. 5] said complaint was filed on March 11, 1952; that in said complaint, in paragraph 1, he charged that after diligent search and inquiry which he had made to discover the name and residence of the defendant, Lucy C. Simons, the defendant, Lucy C. Simons was a resident of some State

or County other than the State of Florida, and that there was no person in the State of Florida, the service of subpoena upon which would bind the defendant.

The Court, as shown by the record, entered a decree pro confesso for failure of the defendant, Lucy C. Simons, in said divorce action to file her answer within the time specified, but in the entry of the decree as aforesaid, the Court did not find that it had obtained jurisdiction over the defendant by virtue of the alleged substituted service, but based the Court's jurisdiction upon the fact that the defendant is alleged in said decree to have filed an answer in said cause, thereby submitting herself to the jurisdiction of said Court; that an examination of the testimony in said cause does not disclose any sufficient evidence to corroborate the testimony of the plaintiff either as to his residence in Florida or the grounds or cause for divorce.

That in addition to the lack of proper service, the concealment of the true facts and the mistake which the Court had made in entering the decree, assuming that the defendant had filed a personal appearance in said cause, plaintiff charges that the said Sol Simons was not on February 20, 1952, or on the date of the filing of the complaint on March 11, 1952, a bona fide resident of the State of Florida, in conformity with the requirements of the Florida law then in force and effect regarding the residence requirements before the plaintiff could seek the jurisdiction of a Florida Court for divorce.

In support thereof, plaintiff alleges that Sol Simons, the plaintiff in said divorce action, concealed from the Circuit Court of Dade County, Florida, the fact that both he and his wife were at that time and had been residents of the State of New York and City of New York for many years; that since 1946 the plaintiff and defendant were controlled [fol. 6] with reference to the maintenance and marital situation by virtue of an order of separate maintenance from the Supreme Court of the State of New York in her favor from which she was receiving $500.00 alimony per month, based upon findings made by the New York Court that prior to the date of the order of separation in 1946, the defendant in said maintenance separation, the said Sol Simons, had been guilty of wilful separation from the

plaintiff, and that it was entirely at the fault of the said Sol Simons, the decedent. This statement was made upon the Court finding as follows:

> "The plaintiff claims and has offered testimony in support of her complaint that her husband was autocratic and despotic, egotistical and tyrannical, and that his actions were such as to constitute inhuman treatment, and in support of her complaint she testified that on various occasions he struck her and forced her to leave by reason of his treatment; * * *
>
> I believe that the husband's testimony is unworthy of belief. I believe he was tyrannical, despotic; that he is a consummate actor; that he turns on tears as one would turn on Croton water.
>
> I am not impressed with the tremor in his voice or the catch in his voice. I am not impressed with what I say is the false tear in his eye when he gave testimony.
>
> I believe that he was cruel; that he was inhuman; that he beat his wife, who is five feet one inch and weighs 120 pounds; that he is six feet and weighs over 250 pounds; and I believe that every action on his part was calculated to and did bring about a nervous condition in his wife, and that no woman has a right to stand it.
>
> Judgment in favor of the plaintiff on the merits. Alimony, $500 a month."

as will show by a true copy of said order attached hereto, marked "Exhibit 3" and made a part hereof.

Plaintiff furtner shows unto the Court that while this determination had been made by a Court of the State of New York having jurisdiction over the parties and over the subject matter, yet in the complaint filed in this cause in the Circuit Court of Dade County, Florida, the plaintiff, Sol Simons, falsely alleged that the defendant in said divorce action, the plaintiff herein, had deserted said Sol [fol. 7] Simons, without reflecting in any way or even bringing to the Court's attention in Florida the fact that he was then under a separate maintenance order from the State

of New York where there had been a definite finding which was res judicata as to the cause of the separation; that the State of New York had definitely determined that there were no grounds for his complaint, and that the wife was entirely in the right, and yet the complaint filed in this Court admits that the parties had not lived together as husband and wife since February 28, 1946; that the suppression of this pertinent evidence and the fact that there was a decree with reference to the status of the parties in the fall of 1946 by a competent court, was a fraudulent concealment of essential facts which render the proceedings null and void in the Florida Court.

The only witnesses produced before the Florida Court were one Sadie Fisher, who filed simply a deposition de bene esse, who stated that she was the aunt of Sol Simons; that she had resided in Miami, Florida, with him and kept house for him from January 31, 1952 to March 4, 1952. She did not purport to testify concerning any matters between Sol Simons and his wife, Lucy C. Simons, after 1946. In the testimony of Sadie Fisher she did not make any statements with reference to any acts which she knew personally with reference to the marital situation between the said parties.

The next witness was Nathan Newmark, who testified that he believed Mr. Simons moved to Miami Beach about mid-November, 1951. He simply testified that Mr. Simons told him that his doctor had told him to come down to Florida—"He told me it did him good".

Albert James Martin testified that he knew that Mr. Simons had moved to Florida, and the first time he saw him was on Thanksgiving Day, 1951 (which was on the 23rd of November, 1951).

Neither Mr. Newmark nor Mr. Martin testified with reference to any knowledge of matrimonial difficulties between the plaintiff in this cause, Lucy C. Simons, and her husband, Sol Simons.

[fol. 8] The only other witness in the case was Sol Simons himself, who testified that he had come to Florida and took possession of an apartment about the 20th of November, 1951. He simply testified at the date of the hearing on the 24th day of April, 1952, that he had taken out a Florida license for his automobile and he filed a declaration of

domicile and citizenship, but he did not state when they were filed or when the license was taken out for the car.

He did not testify that he and his wife had ever lived together after October, 1946, which date is referred to as the date on which the Supreme Court of New York entered the separation agreement.

The testimony presented in this case was wholly without any foundation or substance as to the grounds and acts of divorce, and there was utter concealment that there had been a previous decree of the New York Court with reference to the separation, which was res judicata to any of the issues raised by the plaintiff even in a general way in the said divorce case.

VI.

In addition to the lack of sufficient evidence and the errors committed by the Court, either through concealment or misrepresentation, which led the Court to enter an erroneous decree on April 30, 1952, plaintiff charges that the said Sol Simons was not a bona fide resident of the State of Florida on the date the suit was filed on March 11, 1952, nor had he been a bona fide resident of Florida for a period of more than 90 days prior thereto, because of the following facts and circumstances:

In 1946, particularly in October of that year, when the decree of separate maintenance was granted in favor of the plaintiff, Lucy C. Simons, the said Sol Simons was a bona fide resident of 69-10 Yellowstone Boulevard, Forest Hills, Long Island, New York, where he resided permanently. The decedent lived on said premises continuously and lived on said premises in the year 1952. The said Sol [fol. 9] Simons, the decedent, died while living on said premises continuously up to the date of his death in October, 1960. The said Sol Simons for many years prior to 1952, during 1952 and since said time up to the date of his death, maintained both his residence and business address in the State of New York, and any pretended residence in the State of Florida from on or about Thanksgiving Day of 1951 to and including March 11, 1952, the date the bill for divorce was filed in this State, was simply a sham and a fraud.

In the late spring or early summer of 1952, at a time when the said Sol Simons was still residing in New York at his regular place of abode, and continuing his regular business at his business address, the said Sol Simons communicated with plaintiff herein, and when she asked him concerning rumors about a Florida divorce action, he told her that he knew he was not a resident of Florida; that he would dismiss the said suit, and for her not to be concerned about the same; that the said Sol Simons continued to make payments pursuant to the terms of the New York decree of 1946 and had never given any intimation or statement to the plaintiff herein that he had ever completed his divorce in Florida, or that he had not carried out his understanding and agreement that said cause was dismissed; that up to the date of his death, he had never made any effort to void the proceedings in the State of New York, or had ever made any effort not to live up to the exact terms and conditions of said decree of the Supreme Court of New York.

Plaintiff further charges that notwithstanding the alleged pretense of a residence in Florida from approximately Thanksgiving Day of 1951 to March 11, 1952, to the plaintiff's own personal knowledge, the said Sol Simons did not give up his home address or his business address or the conduct of his business in the State of New York, maintaining the same telephone at both residence and business, and that he was never out of the City of New York at any periodic time for more than a period of approximately two weeks at a time.

[fol. 10] Wherefore, plaintiff charges that the alleged divorce decree of the Florida Court entered on April 30, 1952, was a sham and a fraud upon the plaintiff's rights, and a fraud upon the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida; that the proceedings are void on their face and are void because of the lack of jurisdictional residential requirements of the said Sol Simons at the time said suit was filed; that this proceeding has been filed in this Court for a direct attack upon the validity of said decree, and plaintiff prays that this Court will enter its declaratory decree holding that said divorce decree is utterly void and of no legal force and effect; that plaintiff,

Lucy C. Simons, was at the time of the death of Sol Simons in October, 1960, the bona fide wife of the said Sol Simons, and that she is now his bona fide widow and is entitled to dower in his estate, notwithstanding any will to the contrary, as provided under the laws of the State of Florida.

Plaintiff further charges that she is entitled to a decree of this Court that she is entitled to dower because said alleged divorce decree was based on constructive service which is not sufficient to bar dower rights under the State and Federal Constitution and the Florida decisions with reference thereto.

Charles Gertler, 420 Lincoln Road, Miami Beach, Florida, Attorney for Plaintiff.

Of Counsel:

Montague Rosenberg, Attorney at Law, 407 Lincoln Road, Miami Beach, Florida.

Ward & Ward, by W. G. Ward, 1240 duPont Bldg., Miami, Florida.

[fol. 11] *Duly sworn to by Montague Rosenberg, jurat omitted in printing.*

[fol. 28] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

IN CHANCERY

[Title omitted]

ANSWER—Filed April 30, 1962

Answering the complaint, defendant states:

(1) Regarding the first unnumbered paragraph of numbered paragraph I, defendant is without knowledge or information sufficient to form a belief concerning the plain-

tiff's place of abode, age or disabilities and, therefore, denies those allegations. Defendant specifically denies that plaintiff is the widow of Sol Simons, Deceased.

Defendant admits the allegations contained in the second unnumbered paragraph of numbered paragraph I.

(2) Defendant denies each and every allegation contained in the first sentence of numbered paragraph II except to admit that Sol Simons died on October 26, 1960. Defendant admits the allegations of the second sentence of numbered paragraph II.

(3) Defendant admits that plaintiff, pursuant to Florida Statutes, Chapter 731.35, filed a sworn "ELECTION TO TAKE DOWER" in the County Judges' Court in and for Dade County, Florida, in that certain probate proceeding styled "IN RE: ESTATE OF SOL SIMONS, Deceased.", bearing Case No. 51039-B, in which plaintiff stated, under oath, that [fol. 29] Sol Simons, deceased, "died while a resident of Dade County, Florida"; and that defendant filed objection to said election to take dower on the ground that plaintiff and the deceased, Sol Simons, had been validly divorced by virtue of that certain "FINAL DECREE" of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, bearing the date of April 30, 1952, and entered in the case of Sol Simons, Plaintiff vs. Lucy C. Simons, Defendant, bearing Case No. 148091-E, and recorded in Chancery Order Book 1030, at Page 551, on May 1, 1952. The mentioned election to take dower and the objection thereto are still pending in the County Judges' Court in and for Dade County, Florida.

(4) Defendant admits the allegations of numbered paragraph IV except to deny the legal conclusion that this cause is a direct attack upon the final decree specified in the immediately preceding paragraph (3) of this answer.

(5) Regarding the first unnumbered paragraph of numbered paragraph V, defendant denies all allegations of fact and conclusions of law contained therein except to admit that the Honorable N. Vernon Hawthorne, Circuit Judge, is now dead.

Regarding the first sentence of the second unnumbered paragraph of numbered paragraph V, all allegations of fact and conclusions of law contained therein are denied except to admit that the means of service of process in the divorce proceeding which resulted in the final decree specified in preceding paragraph (3) of this answer was by publication in strict, lawful compliance with the then prevailing and applicable Statutes of the State of Florida, as specifically found and decreed by Circuit Judge Hawthorne in ratifying and confirming the report of the Special Master in Chancery that was filed in that cause. Regarding the second and third sentences of the second unnumbered paragraph of numbered paragraph V, defendant denies each and every allegation of fact and conclusion of law therein contained.

[fol. 30] Regarding the first sentence of the third unnumbered paragraph of numbered paragraph V, all allegations of fact and conclusions of law thereof are denied except to admit that the final decree specified in preceding paragraph (3) of this answer does contain an irregularity in the recital that the defendant in that cause answered. The entire file in the divorce proceeding reveals on its face that the court had acquired jurisdiction over the parties and the cause through service of process on the defendant by publication in strict lawful compliance with the then prevailing and applicable Statutes of the State of Florida. Regarding the second sentence of the third unnumbered paragraph of numbered paragraph V, all allegations of fact and conclusions of law therein contained are denied.

Regarding the fourth unnumbered paragraph of numbered paragraph V, all allegations of fact and conclusions of law thereof are denied except that it is admitted that the Clerk of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, on March 11, 1952, did issue "NOTICE OF PUBLICATION" in the aforementioned divorce proceeding; and did mail a copy thereof, together with a copy of the bill of complaint, to the named defendant at her residence address. It is further admitted that the mentioned "NOTICE OF PUBLICATION" contained April 11, 1952, as the return day and was published once each week for four (4) consecutive weeks in the Jewish Floridian, a

newspaper qualified under the law in which to publish legal notices, commencing with the first publication on March 14, 1952.

Regarding unnumbered paragraph 5 of numbered paragraph V, defendant admits the allegations of fact contained therein as far as they go and states that in addition to what plaintiff alleges the first paragraph of Sol Simon's divorce complaint states, it also stated that the defendant was over the age of twenty-one (21) years and her residence, as particularly as it was known to "plaintiff", was:

[fol. 31] "Lucy C. Simons
Hotel Beacon
75th Street at Broadway
New York, N. Y."

Regarding unnumbered paragraph 6 of numbered paragraph V, defendant denies the allegations of fact and conclusions of law therein contained except to admit that, in the aforementioned divorce proceeding, Circuit Judge Hawthorne, on April 15, 1952, did enter an order that the complaint therein be taken as confessed by defendant for her failure to serve or file her answer as prescribed by law.

Regarding unnumbered paragraph 7 of numbered paragraph V, defendant denies each and every allegation of fact and conclusion of law therein contained.

Regarding unnumbered paragraph 8 of numbered paragraph V, defendant denies each and every allegation of fact and conclusion of law therein contained.

Regarding unnumbered paragraph 9 of numbered paragraph V, defendant denies all of the allegations of fact and conclusions of law therein contained.

Regarding unnumbered paragraph 10 of numbered paragraph V, defendant denies each and every allegation of fact and conclusion of law therein contained except to admit that Sadie Fisher did testify as a witness in the aforementioned divorce proceeding and did corroborate the allegations contained in the complaint establishing grounds for divorce in the State of Florida.

Regarding unnumbered paragraph 11 of numbered paragraph V, defendant denies the allegations of fact contained therein except to admit that Nathan Newmark did testify as a witness at the final hearing in the aforementioned divorce proceeding and did corroborate the bona fides of residence of Sol Simons in Dade County, Florida, for a period of more than ninety (90) days preceding the filing of the bill of complaint on March 11, 1952.

[fol. 32] Regarding unnumbered paragraph 12 of numbered paragraph V, defendant admits the allegations of fact contained therein as far as they go and states that in addition, Albert James Martin, as a witness at the final hearing in the aforementioned divorce proceeding, testified that he knew that Sol Simons had moved to Florida and had become a permanent resident in this State.

Regarding unnumbered paragraph 13 of numbered paragraph V, defendant admits the allegations of fact contained therein.

Regarding unnumbered paragraph 14 of numbered paragraph V, defendant admits the allegations contained therein as far as they go.

Regarding unnumbered paragraph 15 of numbered paragraph V, defendant denies the allegations of fact therein contained.

Regarding unnumbered paragraph 16 of numbered paragraph V, defendant denies each and every allegation of fact and conclusion of law therein contained.

Further answering numbered paragraph V, the defendant states that the allegations contained therein are legally insufficient to support the collateral attack made upon the final decree specified in preceding paragraph number (3) of this answer.

(6) Regarding the first unnumbered paragraph of numbered paragraph VI, the defendant denies each and every allegation of fact and conclusion of law therein contained.

Regarding unnumbered paragraph 2 of numbered paragraph VI, defendant denies each and every allegation of fact and conclusion of law therein contained.

Regarding unnumbered paragraph 3 of numbered paragraph VI, defendant is without knowledge or information sufficient to form a belief regarding the allegations of fact contained therein and, therefore, denies each and every allegation of fact contained therein and demands strict, competent proof thereof.

[fols. 33-43] Regarding unnumbered paragraph 4 of numbered paragraph VI, defendant denies each and every allegation of fact contained therein.

Defendant states:

(a) That the complaint fails to state a cause of action upon which relief can be granted.

(b) That the plaintiff is estopped by silence and barred by laches from asserting the claim exhibited by the complaint in this cause.

Wherefore, having fully answered, defendant prays that the complaint be dismissed with prejudice at the cost of the plaintiff.

Respectfully submitted,

Sibley, Grusmark, Giblin, King & Levenson, Attorneys for Defendant, 605 Lincoln Road, Miami Beach 39, Florida, By: Irving B. Levenson (Of Counsel).

Certificate of Service (omitted in printing).

[fol. 44]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT

IN AND FOR DADE COUNTY, FLORIDA

IN CHANCERY

No. 62C 1980

LUCY C. SIMONS, a widow, Plaintiff,

vs.

MIAMI BEACH FIRST NATIONAL BANK, a banking institution organized and existing under the laws of the United States, with its principal place of business in the City of Miami Beach, Dade County, Florida, as Executor of the Estate of SOL SIMONS, Deceased, Defendant.

Transcript of Testimony

October 22, 1962.

The above-entitled cause came on for hearing before Hon. John J. Kehoe, Judge, pursuant to order setting cause for final hearing.

APPEARANCES:

Charles Gertler, Esq., and Montague Rosenberg, Esq., and Ward & Ward, by James L. Hiss, Esq., and W. G. Ward, Esq., of counsel, Attorneys for Plaintiff.

[fol. 45] Sibley, Grusmark, Giblin, King & Levenson, by Irving B. Levenson, Esq., and Marion E. Sibley, Esq., of counsel, Attorneys for Defendant.

[fol. 48] The Court: Are you ready to proceed?

Mr. Ward: Yes, sir.

I think it would be better to invoke the rule.

Mr. Sibley: One of the bank officials, I assume, will be permitted to stay.

The Court: Yes.

All of the witnesses with the exception of the plaintiff and one representative of the bank may stay. The others will step outside. We will call you when we need you.

Mr. Levenson: May we have an exception with Mr. Liebman, who is one of the witnesses, and he is a lawyer?

The Court: No.

Mr. Ward: I would rather not.

[Thereupon counsel for the respective parties made opening statements to the Court.]

The Court: Call your first witness.

Mr. Ward: I want to call Mrs. Simons, but before I do, I think we could get some of the documentary offers in here if there is no dispute about the time. We can save a lot of time.

OFFERS IN EVIDENCE

I would like to offer the exemplified copy of the proceedings in the State of New York, the one of 1946, and [fol. 49] the other one starting in the fall of 1951, and ending up in April of 1952. I think you have seen them.

Mr. Sibley: I object. They are irrelevant and immaterial.

The Court: The objection will be overruled.

They will be marked Plaintiff's Exhibits No. 1 and No. 2.

[The documents referred to were thereupon marked "Plaintiff's Exhibits Nos. 1 and 2."]

Mr. Ward: We would like to offer as Plaintiff's Exhibit No. 3 the entire court file in Case No. 148091, Circuit Court of Dade County, Florida, filed March 11, 1952.

We will make whatever copies, photostat whatever copies we need when we get through—any copies the Court may feel is necessary, or we will photostat the entire file.

Mr. Sibley: No objection.

The Court: Plaintiff's Exhibit No. 3.

[The document referred to was thereupon marked "Plaintiff's Exhibit No. 3."]

COLLOQUY BETWEEN COURT AND COUNSEL AND STIPULATION RE DEPOSITIONS.

Mr. Ward: In the nature of a pretrial conference, I think we can save a lot of time in this case if we could agree that these depositions taken by both sides, other than, of course, the parties who are present, can be considered in evidence, [fol. 50] established evidence, although the parties are out of the city.

I do not say every last word of each deposition is actually necessary, but since there is no jury here, and since we could put those depositions in—they are the depositions of a superintendent up there of the building, and a mailman, and a garage man, and a few other people that have a bearing upon his possession of his apartment, and things of that type during all these years, and rather than read them out, the questions and answers, if there is no objection, we can save a lot of time and let the Court, when we get through with this, give us maybe a half hour or forty-five minutes to argue that part which is pertinent. It will save a lot of time.

The Court: I have not seen the depositions, but if they run true to pattern, there is probably fifty per cent of it that is irrelevant or unnecessary, and if you want to use it, you use it. I will not read them.

Mr. Ward: We would only pick out what we decide is necessary at the time of argument.

The Court: If you want to use it, you ought to get it and read it into the record.

Mr. Ward: All right.

Mr. Rosenberg: We might save time by reading a copy. [fol. 51] Mr. Sibley: We have no objection to reading from copies, but there ought to be a tender here, and they ought to be marked for identification and in evidence. I think we ought to get our record in shape.

Mr. Ward: That is what I intended to do.

Mr. Sibley: We will not know where the record begins and conversations end.

The Court: Can we assume, then, there will be no objection to the use of the interrogatories except as to materiality, the form of the taking and so forth?

Mr. Sibley: There will be no objection to the form of taking. The only objection is as to materiality.

Mr. Ward: That goes both ways.

The Court: The depositions, other than those of the witnesses who are present, will be received in evidence subject only to an objection as to materiality as a quoted part of the deposition to be used by either side.

Does that correctly state it?

Mr. Ward: That is correct.

Mr. Sibley: So stipulated.

The Court: We have that out of the way.

Mr. Ward: Your Honor, I could start here. I think before we put the witness on the stand, in order to keep the record clear, I would like to put this in order. The [fol. 52] first is the deposition of William H. Weber. This was a deposition taken May 23, 1962, in New York City.

I am reading from page 3.

"Q. Give your full name, Mr. Weber.

"A. William Henry Weber.

"Q. Where do you presently reside?

"A. 2 Hedge Lane, Merrick, Long Island.

"Q. Mr. Weber, let us take some time in 1951, January. Were you employed in 1951?

"A. I was.

"Q. By whom?

"A. By the Mayflower Realty Corporation.

"Q. What is the nature of the business of Mayflower Realty Corporation?

"A. I was manager and superintendent for 17 years.

"Q. For what outfit and where?

"A. 44 Court Street.

"Q. Is that the address of the Mayflower Realty Corporation?

"A. Yes, 44 Court.

"Q. You say you were superintendent and what?

"A. Manager.

[fol. 53] "Q. Of what premises?

"A. 69-10 Yellowstone Boulevard, Forest Hills.

"Q. Long Island?

"A. Yes.

"Q. That is Forest Hills, Queens, New York?

"A. Queens.

"Q. Queens, New York. Mr. Weber, when did you first appear upon these premises as a superintendent and manager of this apartment house.

"A. I went in there—well, I left in 1958. I was there 17 years.

"Q. All right, then you came upon the premises in 1941; is that right?

"A. Yes, sir.

"Q. What was the nature of your work at said premises?

"A. Well, I had to see that everything was done right through the building.

"Q. What was the nature of the building?

"A. Apartment house.

"Q. About how many tenants would you say were in the apartment house?

[fol. 54] "A. One hundred and fifty-six.

"Q. In the apartment house was there a tenant by the name of Sol Simons?

"A. Anybody—

"Q. Anybody by the name of Sol Simons in that apartment house?

"A. Yes.

"Q. Did he occupy an apartment there?

"A. Yes, he did.

"Q. Will you state the floor on which he occupied the apartment and the room-apartment, if you recall it?

"A. On the fourth floor, 401, apartment number.

"Q. You said there were some 450-some odd tenants in the building; is that right?

"A. One hundred fifty-six.

"Q. Did you know Mr. Sol Simons?

"A. I sure did.

"Q. When you say 'I sure did,' will you explain what you mean by that?

"A. I done a lot of business with him.

"Q. When you say 'business,' will you explain what you mean by 'business'?

[fol. 55] "A. I had to see all his work was done. I had his apartment all painted and in the late years of 1951—

"Q. Yes. Now, let me ask you this. Do you know what business Mr. Simons was in?

"A. I believe he was in the jelly business or something like that.

"Q. Confectioneries, jellies and things like that?

"A. Yes.

"Q. What business did you say he was in?

"A. He had all kinds of jelly jars. He bought up all of that jelly, I mean grapes and stuff from the countries.

"Q. Let us take the months of September, October and November 1951. Did you perform any services for Mr. Simons in those months, as I stated, in 1951?

"A. I did. I had the apartment painted for him.

"Q. When you say you had the apartment painted—

"A. I had to be there. He wanted things done.

[fol. 56] "Q. Was Mr. Simons present in the apartment at the time you had it painted?

"A. No. He left for about a week. He didn't want to smell it.

"Q. When did he return in that time?

"A. What day?

"Q. I don't expect you to know what day. In the latter part of 1951, particularly October, November and December, was Mr. Simons away from his apartment?

"A. Was he?

"Q. Yes.

"A. Well, as far as I remember Mr. Simons never went away for more than a week or ten days at the most.

"Q. When you first came upon the premises in 1941—

"A. Is it 1941?

"Q. [continuing] —was Mr. Simons a tenant on the premises?

"A. He was when I came in there.

"Q. When your left in 1958 when did you leave said premises?

"A. When?

[fol. 57] "Q. Yes.

"A. I believe it was in April 1958.

"Q. Was Mr. Simons still a tenant in that premises?

"A. He was still there. I even went up and had an hour's talk with him.

"Q. Before you left?

"A. Yes. We shook hands and whatnot.

"Q. Tell me this. What was the reason for retiring from being the superintendent and manager of premises 69-10 Yellowstone Boulevard, Forest Hills?

"A. What was—

"Q. What was the reason for retiring?

"A. Because I didn't feel well. I turned out to have a bad stomach."

And so forth.

Mr. Levenson: Read the rest of it, Mr. Ward.

Mr. Ward: All right.

"A. Because I didn't feel well. I turned out to have a bad stomach. I started to go to the doctors and they told me I better lay off, I have been working a little too hard.

"Q. What other services, if any, did you perform for [fol. 58] Mr. Simons during the period of time you stayed there?

"A. What other services?

"Q. Yes. What services, if any, did you perform? Will you enumerate?

"A. Whenever he wanted things done, he had to call me and I had to go get my handyman to go up or something done up there. That is all I can tell you.

"Q. During the months of October, November, December 1951 did you see Mr. Simons?

"A. In the end of 1951.

"Q. In October, November, December, did you see him?

"A. Yes, I saw him.

"Q. How often would you say you saw him in those months?

"A. At least once a week.

"Q. Was there any exception, was there a period of time when he wasn't in the apartment or near the apartment or in the house during that latter part of 1951?

"A. He could go away—he would fly, you know. It don't [fol. 59] take long to take a trip. Where he went, I never watched.

"Q. Did you know where the man went?

"A. He never would tell me.

"Q. During the period of time you did any work for him or knew him, did he leave the premises at any time?

"A. Did he leave?

"Q. Yes, at any time did he leave the premises, that you know of?

"A. Yes, he went away for a week or so.

"Q. What was the longest period of time he ever was away in 1951, the latter of 1951?

"A. What—

"Q. What was the longest time he was away in the latter part of 1951?

"A. About ten days.

"Q. Did he ever go away in 1952 of January, February or March? Did he leave the premises?

"A. Well, I don't know if he went away. If he did go away, it would be only a couple of days because he had his car down in the garage. I always knew when his car went out.

"Q. Did you see him in the months of January, February and March 1952?

[fol. 60] "A. I did, yes.

"Q. About how often would you say during those months?

"A. At least once a week, sir, I had to come in contact with him.

"Q. When you came in contact with him, was there any reason for that direct contact?

"A. I happen to have an office downstairs. He had to pass my office to come in and talk to me the night he left.

"Q. What were your hours on the premises?

"A. Mine?

"Q. Yes.

"A. That is why I left. I usually get up 6:00 in the morning and go to bed at 12:00, 1:00 at night.

"Q. You lived on the premises?

"A. I lived there.

"Q. What apartment did you occupy on the premises?

"A. 122.

"Q. Was there any time that he was absent in excess of two or three weeks? When I say 'in excess,' was there any [fol. 61] time when he was absent from his apartment more than two or three weeks?

"A. Not that I remember. I really don't think he did.

"Q. Let me ask you this. In the months of October, November, December was he ever absent three weeks or more?

"A. No.

"Q. In the months of January, February and March 1952 was he ever absent three weeks or more?

"A. In 1952?

"Q. In 1952, that is the beginning of 1952.

"A. As I said, if he went away he would be right back within a week's time. He never stayed away months or anything like that.

"Q. Did you have any conversation with anybody else regarding Mr. Simon's some time in—

"A. You mean now?

"Q. No, not now. Did you ever have any conversation with anybody else with regard to Mr. Simons—

"A. No, sir.

"Q. Let me give you the time. (continuing) —in the latter part of 1951 or the early part of 1952?

[fol. 62] "A. I never had any.

"Q. You never had any conversation with anybody concerning Mr. Simons?

"A. About him, you mean?

"Q. About him.

"A. No.

"Q. When he was away in 1951, the latter part of 1951, that is October, November and December, you say you performed or caused certain work to be performed in his apartment?"

Mr. Levenson: I objected, Your Honor.

The Court: Overruled. Go ahead. Read the answer.

Mr. Ward: "Q. Did you perform any services in his apartment or cause anybody to perform any services in his apartment?

"A. A paint job.

"Q. When you say 'a paint job' about when would you say that paint job took place?

"A. Exact date?

"Q. Well, I don't expect you to know the exact date. Would it be the latter—"

Then the objection.

[fol. 63] "A. I wouldn't know what particular date.

"Q. When you say 'what particular date' would you know the time?

"A. It could be in months that he had it done.

"Q. Was it the early part—"

Then he objected. We will go down to line 18.

"Q. Did this paint job take place in October or November or December 1951?"

Then Mr. Levenson objected.

"Q. Did that paint job take place at that time?

"A. I am pretty sure, yes, sir.

"Q. It took place then. How long did the paint job take?

"A. About two and a half days.

"Q. About two and a half days?

"A. Yes, two days.

"Q. During that time did you know where Mr. Simons was?

"A. He went away. He didn't say where he was going. You see, anybody left in the building any length of time over a month, they go over and ask me to see that the [fol. 64] battery is kept up."

Then Mr. Levenson moved to strike the answer.

Jump down to the bottom of the page, unless you want something read.

Mr. Levenson: No.

Mr. Ward: "Q. Is there any reason why you could recollect that the paint job was done at that particular time in his apartment?

"A. Well, it's pretty hard to say. I remember doing it. That is all I know."

Then there was cross examination from the beginning of page 15.

Mr. Levenson: May we read our cross examination?

Mr. Ward: Do you want to read your cross examination?

Mr. Levenson: I guess this is the time for it.

The Court: Go ahead.

Mr. Levenson: "Q. Mr. Weber, how old are you, sir? How old are you?

"A. Fifty-nine.
"Q. What is the exact date of your birth?
"A. What did you say?
"Q. What is the exact date of your birth?
"A. January 21.
"Q. What year, sir?
[fol. 65] "A. 19— I don't know. 1903, I think, I was born.
"Q. You don't know what year you were born?
"A. Offhand, I don't know. I am a little confused.
"Q. Do you know where you were born?
"A. Do I know what?
"Q. Do you know where you were born?
"A. I tell you, I fell. It affected me here a little when I fell down. I don't hear so good. That is why I get a little nervous. Don't pay any attention to me.
"Q. Do you know where you were born, Mr. Weber?
"A. I don't know the number. Hester Street, that is all I know. Around here.
"Q. Did you have any education, Mr. Weber?
"A. Did I ever what?
"Q. Have any education.
"A. Yes, fairly.
"Q. Where did you go to school?
"A. 108th, that is all I remember, Harlington Avenue, East New York.
"Q. How far did you go in school?
[fol. 66] "A. I went up to—I graduated.
"Q. From what?
"A. Public school.
"Q. Did you go to high school?
"A. No, no. I was an orphan. My mother and father died when I was a year old.
"Q. Had you been in an orphanage?
"A. No, I haven't been. I have been pushed around.
"Q. Where did you spend your early years as an orphan?
"A. With relatives. They kicked me around in East New York. That is all I know.
"Q. Do you know their names?
"A. They are dead and gone now.
"Q. Do you remember their names?
"A. Yes. My uncle.

"Q. What is his name?

"A. His name was Andrew Weber. He was my father's brother. I think he took a hold of me when my mother and father contracted pneumonia here, they tell me. I wasn't even a year old. I don't remember.

"Q. Mr. Weber, do you remember the names of any of [fol. 67] your schoolteachers?

"A. No, I do not. I don't remember one.

"Q. Do you remember the name of your immediate superior in Mayflower Realty Company?

"A. Now? The ones who own it now?

"Q. No, the one who had employed you.

"A. Sidney Callaco.

"Q. Do you know the names of any other people in that company?

"A. The Callaco family.

"Q. You say that you recently fell and had an accident?

"A. I fell in the backyard.

"Q. When did that accident occur?

"A. About two years ago.

"Q. You pointed to your head before. Did it hurt you in the head?

"A. No, it didn't hit me in the head. It hit me here. I got a belt on, and it bothered me.

"Q. Before when you mentioned—

"A. I never had any trouble.

"Q. You pointed to the left side of your head. Did it injure your head?

"A. No, it didn't injure my head.

[fol. 68] "Q. I didn't hear you, sir.

"A. You didn't hear me?

"Q. What did you say? I didn't hear you.

"A. I said I fell and Dr. Casso was the one, my doctor, out there.

"Q. You are feeling better now?

"A. Oh, yes. I still get that kink in the back. I went to the chiropractor about twenty times, but it never helped. It never helped me.

"Q. How many apartments were in the apartment house at 69-10 Yellowstone Boulevard, Forest Hills, Queens, New York?

"A. How many apartments?

"Q. Yes.

"A. 156.

"Q. How many people on the average occupied each apartment, if you know?

"A. From two to three.

"Q. There were roughly 300 people, at least, in that building?

"A. More than 300.

"Q. More than 300?

"A. Oh, yes.

"Q. Did you keep a log record of the comings and goings [fol. 69] of each of the tenants in that building?

"A. I suppose we did, yes.

"Q. You did? Every time a tenant went in and out you logged them in?

"A. Oh, no. You mean moved—

"Q. Went in and out.

"A. No, I couldn't keep a record of it. I had no occasion to do that.

"Q. Are you presently able to tell us the comings and goings of each of the tenants in that building for the 17 years that you were there?

"A. I guess I could tell you a whole lot about most of them.

"Q. Did Mr. Sol Simons ever confide in you?

"A. In what way?

"Q. Did he ever discuss his family with you?

"A. No.

"Q. Did he ever discuss his business with you?

"A. No.

"Q. Did he ever discuss his aspirations?

[fol. 70] "A. I usually hear a conversation. Like I would sit here and he would be talking on the phone, distant phones.

"Q. He never spoke to you about it?

"A. No, nothing about his business.

"Q. You are not a close, confidential friend of his?

"A. No.

"Q. You were merely the superintendent in the building where he resided?

"A. When he called me, he called me for what he wanted; that's all. I sit in the house and have a cigarette or something, but that's all.

"Q. Did he ever discuss with you his intentions, Mr. Weber?

"A. No, sir, never.

"Q. When Mr. Simons had plans to go some place or do something, did he come down and discuss that with you?

"A. Occasionally he would say 'I am going away for a week.'

"Q. He never told you where he was going or what his purposes were?

[fol. 71] "A. I never asked the man, 'where are you going?' because I happen to have the key to the apartment.

"Q. Do you know Lucy C. Simons?

"A. I knew her, yes.

"Q. When was the last time you spoke to Lucy C. Simons?

"A. When she called up and asked me to come over here.

"Q. When was that?

"A. Quite a few months ago.

"Q. Did she come to see you personally?

"A. She come one day and asked me if I would verify—I remember the occasion she had when he wouldn't let her in. He told me not to let her in. That was the last time I saw the lady.

"Q. When was that?

"A. Quite a few years before I left. What year—

"Q. Could you remember the year?

"A. I couldn't tell you the year.

"Q. It was before you had his apartment painted in 1951, wasn't it?

[fol. 72] "A. Yes.

"Q. How many years before that?

"A. Well, I—

"Q. How long before the occasion in 1951 when you said you had his apartment painted did Miss Lucy C. Simons come to the apartment and want to get in?

"A. How long before? I don't know how long. All I remember was the occasion. There was a mix-up there, that is all, and she was put out.

"Q. Was it several years?

"A. It might have been a year before.

"Q. A year before?

"A. Yes.

"Q. Is it possible that it was five or six years?

"A. No.

"Q. It is not?

"A. Never let the apartment go that long. Within three years' time they painted them.

"Q. I mean when Miss Simons came back to the apartment and sought to get in.

[fol. 73] "A. Oh, no. She was only gone because he gave me orders that particular day, 'I don't want you to let her in.' So I let her in just the same.

"Q. Do you remember, of your own knowledge, what year it was that Miss Simons left the apartment?

"A. No, I do not.

"Q. Do you know if Miss Lucy C. Simons ever lived in that apartment?

"A. Did she ever live there?

"Q. Yes.

"A. Yes.

"Q. When did she come to live there?

"A. When did she come to live there?

"Q. Yes.

"A. She was there when I was there.

"Q. In 1941?

"A. She was there.

"Q. When after 1941 did she leave the apartment?

"A. I don't know what date.

"Q. Mr. Weber, you don't remember when she left the apartment no longer to reside there?

[fol. 74] "A. I don't remember the date, no.

"Q. Do you remember the year?

"A. I don't remember the year even. Of course I was there 17 years. I don't remember the years. Many a thing happened in them years, believe me.

"Q. Do you know whether Lucy C. Simons ever left the apartment permanently not to return?

"A. I never knew his family troubles. I knew he didn't want her in there. That is all I knew.

"Q. Did she continue living there until you left in—

"A. No, not after.

"Q. When, sir, if you can tell us, did she leave?

"A. When?

"Q. Yes.

"A. I couldn't tell you what day, what year it was.

"Q. You can't even tell us the year?

"A. I couldn't tell you what year that was.

[fol. 75] "Q. You recollect an incident where Mr. Simons advised you not to let Miss Simons in?

"A. That's right.

"Q. Can you tell us what year that occurred?

"A. What year that was?

"Q. Yes.

"A. I do not know. I can't remember that. I only remember the incident.

"Q. Do you remember that she did return to live in the apartment after that?

"A. He didn't after that.

"Q. She didn't?

"A. I don't know. I don't think she lived there after that.

"Q. Actually, you are not too familiar with the comings and goings of the tenants, are you?

"A. I only remember things I did. I don't remember their family troubles or what it was all about.

"Q. All right, sir, you say several months ago Lucy C. [fol. 76] Simons came to your home in Long Island and spoke to you about this case? She did?

"A. She came, yes. She came to the door.

"Q. What did she say to you on that occasion?

"A. She only asked me, 'Do you remember anything about Mr. Simons?'

"I said, 'A little bit. What is the trouble?'

"Q. What else?

"A. Nothing else.

"Q. Nothing else was said on that occasion?

"A. Nothing else for me to say. Whatever I say—I told her wouldn't tell nothing but the truth to anybody. What I know I am going to tell.

"Q. What I am trying to figure out, she came to your house, she rang the doorbell and what happened? Did you answer the door?

"A. No, my wife answered the door.

[fol. 77] "Q. Was Miss Simons invited in?

"A. Yes, I believe she was.

"Q. How long did she stay with you on that day?

"A. About 10 minutes, 10 or 15 minutes. First, she had to go back on the train.

"Q. Did she discuss this particular case that is pending in court with you?

"A. She didn't discuss anything about the case.

"Q. What did she ask you to do?

"A. She asked me would I sign a statement to the effect about Mr. Simons' doings, and I said 'Yes, I could tell you.'

"Q. You asked you to sign a statement to what effect?

"A. About Mr. Simons. I forget what it was that I signed.

"Q. Did you sign such a statement?

"A. I signed a statement.

"Q. Do you have that statement with you?

"A. Not me.

"Q. You signed a statement for Miss Simons?

[fol. 78] "A. I did.

"Q. At what time?

"A. At that time yes. By notary.

"Q. You signed by a notary?

"A. Yes.

"Q. Was a notary in the house?

"A. No, I had to go to one.

"Q. When did you go to see one after that?

"A A couple of days later.

"Q. On that occasion was Miss Simons present?

"A. No, no. She wasn't there any more.

"Q. Did you prepare the statement?

"A. Not me.

"Q. Who prepared the statement?

"A. I believe my company did.

"Q. Your company prepared a statement?

"A. Well, how would she know from the day I took my job until I quit? It's all on there.

"Q. Do you know, of your own knowledge, who prepared the statement?

[fol. 79] "A. I think the company—I don't know.

"Q. You do not know who prepared the statement?

"A. No."

We will skip a page and go to page 32.

"Q. Miss Simons was at your house a couple of months ago from today and she stayed there ten minutes and asked you if you would sign a statement; is that right so far?

"A. So far, yes.

"Q. To what effect and about what did she ask you to sign the statement?

"A. To what effect?

"Q. Yes.

"A. About what?

"Q. Yes.

"A. The statement was about how long I knew Mr. Simons. How long he lived there.

"Q. A few days after that you signed a statement before a notary public?

"A. That is right.

"Q. How did you get the statement that you signed?

[fol. 80] "A. How did I get it?

"Q. Yes.

"A. They mailed it.

"Q. It was mailed to you?

"A. I am pretty sure it was mailed to me."

Mr. Levenson: Question on page 34.

"Q. You received this statement that you subsequently signed before a notary public in the mail at your home, yes?

"A. I think so. I am not sure whether it came by mail or whether it was left there. I can't tell.

"Q. What did you do with that statement thereafter?
"A. What did I do with it?
"Q. Yes.
"A. I don't know. My wife could tell you what she did with it. I don't know.
"Q. Did you take it with you and go to a notary public?
"A. Right across the street on Merrick Road.
"Q. Who was that notary public?
[fol. 81] "A. Who was he?
"Q. Yes.
"A. A real estate man was there.
"Q. Do you know his name?
"A. Egan, I believe it is, it says on the sign.
"Q. What is his full name?
"A. I wouldn't know.
"Q. Mr. Egan in the real estate business?
"A. Yes.
"Q. In Merrick, Long Island?
"A. Yes.
"Q. Do you know his address?
"A. It would be Merrick Road and Babylon Turnpike. That is right on the corner.
"Q. Did you pay him a fee for notarizing the statement?
"A. He didn't charge me anything.
"Q. What did you do with the statement thereafter?
"A. What did I do with it?
"Q. Yes.
"A. I don't recall what my wife did with it. I gave it to my wife. That is all I remember.
[fol. 82] "Q. You gave the statement to your wife?
"A. Yes.
"Q. After that you don't know what happened to it?
"A. I don't know what happened to it.
"Q. Did you retain a copy of it?
"A. No, I didn't have no copy of it.
"Q. You don't have a copy of it today?
"A. No.
"Q. Did your wife ever tell you what she did with it?
"A. No, she never told me. She is out there, if you want to see her.

"Q. Did your wife tell you what she did with it?

"A. No, she never told me.

"Q. When Miss Simons came to your house on the occasion that you mentioned, was your wife present when you talked to Miss Simons?

"A. Yes, she was.

"Q. Did your wife have a conversation with Miss Simons [fol. 83] outside of your presence?

"A. No, not that I know of, no. It was a case of hurry, catch a train.

"Q. When before that occasion—

"A. When what?

"Q. When before that occasion of a couple of months ago did you see Miss Simons?

"A. I haven't seen her in years.

"Q. Mr. Weber, you remember a couple of months ago from today Miss Simons was at your house?

"A. Yes, I remember that.

"Q. When before that had you seen Miss Simons?

"A. Not in years.

"Q. When?

"A. When? I couldn't tell you.

"Q. What years was the last time?

"A. I couldn't tell you. When I was in the building. When she left. Whatever year that was, that was the last time I ever seen the lady.

"Q. It might have been fifteen or sixteen years ago for [fol. 84] all you know?

"A. Who knows?

"Q. Could it have been fifteen or sixteen years ago, sir?

"A. I couldn't say how many years ago since I saw her, since the time she left there. I don't remember. I never seen her after that.

"Q. Have you been subpoenaed to appear here today?

"A. Here?

"Q. Yes.

"A. No.

"Q. You came here voluntarily?

"A. I came here and told them I would gladly help them out in any way.

"Q. Who is 'they'?
"A. What?
"Q. Who did you say you would gladly help out?
"A. I said I would be glad to tell all I know.
"Q. Who did you say that to?
"A. Mrs. Simons.
"Q. When did you say that to her?
[fol. 85] "A. When, I don't remember. I only remember the time she came to the house.
"Q. After that she must have contacted you in order for you to be here today. When was that?
"The Witness: Excuse me, gentlemen, I think I am going to go home. You can summons me all you want. I am getting the most foolish questions. You are bringing the damndest stuff I ever heard. Simons is outside. Get her here.
"Q. How did you get here, Mr. Weber?
"A. I came in a cab.
"Q. On whose request?
"A. Mrs. Simons.
"Q. When was that request made?
"A. I should say a couple of weeks ago. I don't recall.
"Q. How was it made.
"A. Over the telephone.
"Q. Miss Simons called you?
"A. Yes, and wanted to know if I could come over and testify.
"Q. How long ago was that?
[fol. 86] "A. It must have been a couple of weeks ago.
"Q. A 'couple of weeks' is rather indefinite. Was it last week?
"A. I don't say last week. Two weeks ago, I'd say.
"Q. Was it two weeks ago?
"A. It must have been.
"Q. Are you positive about that?
"A. I am pretty sure it was a couple of weeks.
"Q. Today is the 23rd of May.
"A. Yes.
"Q. Two weeks ago, sir, would be the 9th of May. Was it on the 9th of May?

"A. I don't know what date it was on. I don't know that.

"Q. What day of the week was it?

"A. What day? I don't know. The middle of the week some time over the phone.

"Q. Are you sure it was two weeks ago?

"A. That is all.

[fol. 87] "Q. Two weeks ago Miss Simons called you and asked you to be here?"

Go to the bottom of page 41.

"Q. Mr. Weber, it was two weeks ago that Miss Simons asked you to appear for the taking of your testimony?

"A. I don't know whether it was two weeks ago. I know it was a couple of weeks ago, at least.

"Q. Was it more than two weeks?

"A. I don't think so. I think it was around two weeks.

"Q. All right, sir, after that did you receive any other communications from Miss Simons or her attorneys?

"A. No.

"Q. Have you been offered any money for your testimony?

"A. No, sir. Only my expenses, carfare.

"Q. You were offered your carfare?

"A. Nothing else.

"Q. You were offered your carfare for coming here?

"A. Yes, sir.

[fol. 88] "Q. How much was that?

"A. It might run around eight or ten dollars.

"Q. Has that been paid to you?

"A. It will be. It hasn't been.

"Q. You have received no money thus far?

"A. Not yet.

"Q. Do you expect to receive any other than for your transportation?

"A. If she want to pay it, all right.

"Q. You do expect, then, to receive some money other than for your transportation?

"A. No, sir.

"Q. You do not? No money has been promised you other than for transportation?

"A. No money.

"Q. Do you know if any money has been promised to your wife for your appearance here today?

"A. No.

"Q. Do you know that?

"A. I know. I'm pretty sure. My wife would tell me.

[fol. 89] "Q. Did you discuss it with your wife?

"A. Did I what?

"Q. Did you discuss it with your wife?

"A. I didn't discuss it with her about money. I know I get my expenses paid, that is all, but if that ain't expenses, don't pay me.

"Q. When you were superintendent of the building at 69-10 Yellowstone Boulevard, Forest Hills, how many men worked with or under you?

"A. Five.

"Q. Were they subordinate to you?

"A. Yes, they did.

"Q. You were their boss?

"A. I was their boss.

"Q. Did you keep a log in the apartment house?

"A record, a book, that guests signed when they came in to visit the apartment house?

"A. No.

"Q. No record whatsoever was kept in the apartment [fol. 90] house of the comings and goings of the guests?

"A. No.

"Q. Guests that visited tenants?

"A. No, we didn't have nothing to do with it.

"Q. They didn't have to sign anything?

"A. The doorman had nothing to do with that.

"Q. Were you on the premises at 69-10 Yellowstone Boulevard, Forest Hills, during the entire month of March 1952?

"A. I'm pretty sure I was.

"Q. You were there every day?

"A. Every day.

"Q. Did you ever at that time see Miss Lucy C. Simons on the premises?

"A. I haven't seen Mrs. Simons from the day she left. That is all I can say.

"Q. That was some time before 1951?

"A. In them particular months I had 900 gallons of oil a day. I had to heat the house. I couldn't leave it five minutes.

"Q. The last time you had seen Miss Simons was before [fol. 91] 1951; is that correct?

"A. That, I couldn't tell you.

"Q. You pinned down this painting job in 1951.

"A. Late.

"Q. Late. But she had gone from the apartment before that?

"A. She was gone. I don't know how long she was out.

"Q. During the month of March 1952 you did not see Miss Simons?

"A. No, sir.

"Q. Do you know her sister, Helen Forman?

"A. Never met her. I don't know anybody.

"Q. You wouldn't know her if you saw her?

"A. No, sir. I wouldn't have known this lady if I met her on the street, Mrs. Simons.

"Q. Was that because you had so many tenants that you couldn't keep up with them?

"A. I wouldn't know her if I saw her on the street. I [fol. 92] didn't see her in so many years.

"Q. Did you know all of your tenants in your building by sight?

"A. Yes.

"Q. All three hundred?

"A. Oh, yes. More than three hundred.

"Q. You knew them all by sight?

"A. I knew them all.

"Q. During the month of April 1952 did you see Miss Lucy C. Simons on the premises at 69-10 Yellowstone Boulevard, Forest Hills?

"Did you, sir?

"A. Mrs. Simons, did I see her?

"Q. During the month of April 1952.

"A. I don't recall what month. The last time I saw her

was when I let her in the apartment. That was the last day I ever came in contact with that lady.

"Q. Just to be clear, that was before the paint job in 1951?

"A. Yes.

"Q. Were you pretty well aware of the comings and goings of the people in your apartment building?

[fol. 93] "The Witness: Yes, I do.

"Q. Will you answer it, sir?

"A. If I come in contact with the people going back and forth, I wouldn't say 'Where are you going,' would I?

"Q. If you saw former tenants on the premises you would have known that they were there and remembered it, wouldn't you?

"A. Naturally.

"Q. You do not remember seeing Lucy C. Simons during the month of March or April 1952 on the premises?

"A. Did I see her?

"Q. Yes.

"A. I don't remember whether I seen her that particular month. I know—after all, he was a man—

"Q. No, he—

"Mr. Weber, you didn't hear me.

"A. I did hear you.

"Q. I said Lucy C. Simons. You didn't see her—

"A. No.

[fol. 94] "Q. (continuing) —in March or April 1952 on the premises?

"A. No, I haven't. He calls her 'Lucy.' I don't know who 'Lucy' is.

"The Witness: I know about Mr. Simons, that is all I know. After all, I was only an employee there.

"Q. Has anybody discussed the testimony you have given here today with you before the taking of this deposition?

"A. Has anybody discussed it with me?

"Q. Yes.

"A. No.

"Q. You never discussed the testimony—

"Mr. Gertler: One moment. I object to that question. I feel that it is a question that wants to place this witness immediately in an unfavorable position.

"Mr. Levenson: Because you did prompt him before.

"Mr. Gertler: I will state this without hesitation, we did discuss the matter with him and he doesn't understand your questions.

"Mr. Levenson: I have no further questions.

[fol. 95] "Mr. Gertler: Did you ever discuss this matter with me before?

"The Witness: I did a little bit, yes. You asked me questions.

"Mr. Gertler: I asked you questions and you answered them; is that right?

"The Witness: Yes.

"Mr. Gertler: That was before testimony was taken, several weeks or several months before that.

"The Witness: Yes.

"By Mr. Levenson:

"Q. When before the taking of this deposition did you discuss your testimony with Mr. Gertler and how many times?

"A. Did I discuss it with somebody else, you mean?

"Mr. Gertler: No, with me.

"Q. With Mr. Gertler.

"A. Yes.

"Mr. Gertler: When?

"A. When? I don't know.

"Mr. Gertler: Today you did; isn't that right?

[fol. 96] "Mr. Levenson: Mr. Getler, let him testify.

"Mr. Gertler: I want the facts of these things. What are you trying to do, befuddle him or something? I will give it to you."

The middle of page 52.

"Q. Mr. Weber, of your own knowledge, exactly how many times in the last several months have you discussed the testimony you have given today with Mr. Gertler?

"A. Only today and once before when he called up.
"Q. You have never been in his office before?
"A. No, I don't know where he is.
"Q. Do you have a bank account?
"A. Do I—
"Q. Do you have a bank account?
"A. No, I don't, not any more.
"Q. You have no bank account?
"A. Not now any more. I own the house.
[fol. 97] "Q. Does your wife have a bank account?
"A. Oh, yes.
"Q. Where does she bank, sir?
"A. She has two banks. I don't know where she banks.
"Q. Are the banks in Forest Hills?
"A. A checking account.
"Q. What is your wife's full name?
"A. Maude Elaine.
"Q. Would you spell her full name?
"A. M-a-u-d-e E-l-a-i-n-e. What do you mean, her maiden name?
"Q. Her first name is Maude and her second name is Elaine?
"A. Elaine, E-l-a-i-n-e, I guess.
"Q. You are not sure of the spelling of her name?
"A. No. I never call her 'Elaine.'
"Q. Her last name, of course, is Weber?
"A. Weber now.
"Q. How long during the month of March 1952 was Mr. Sol Simons absent from the apartment at 69-10 Yellowstone [fol. 98] Boulevard in Forest Hills?
"A. How long?
"Q. Yes.
"A. The most I ever seen the man absent would be at least ten days. That would be the most he would ever go away, that I knew of.
"Q. It is possible that he might have been away for considerably longer periods of time?
"A. I doubt it.

"Q. But you are not sure?

"A. I can't say anything about that, but I am pretty sure he never went more than ten days.

"Q. But you can't be positive, can you?

"A. He went on business all the time.

"Q. Will you explain to me how you recollect so clearly that you painted Mr. Simon's apartment at the end of 1951?

"A. Because that was the last job I ever did for him.

"Q. That was the last job—

[fol. 99] "A. Painting.

"Q. That was the last job you ever did?

"A. For him.

"Q. How frequently did you paint apartments in the building?

"A. Three years.

"Q. After that you never painted the apartment again for him?

"A. Every three years the apartments would be painted. We had our regular painters.

"Q. You had 156 apartments. Did you paint all of them at the same time?

"A. No, no.

"Q. How do you recollect so clearly that this particular apartment, 401, was painted at the end of 1951?

"A. Because I remember the incident. When he went away for a few days, he left a lot of work for me to have done, do this, and do that, and have the blinds taken down and have his kitchen and everything, paper taken off and all that. He had me up there. That is how I recall. You [fol. 100] see, when there is a woman in the house, you don't have to bother, but for the man I had to attend to it. He had a girl working for him steady.

"Q. Who was that?

"A. I don't know her last name. Sadie.

"Q. Sadie?

"A. Her name was Sadie.

"Q. Do you recollect that it was Sadie Minor?

"A. No, no, Meyer.

"Q. Minor, her last name was Minor?

"A. It might have been.

"Q. But you don't know?

"A. I don't know her last name. I wouldn't know her last name.

"Q. What other occasion do you recollect where you did specific work in Apartment 401?

"A. The last time you mean I had anything done in there? Is that what you mean?

"Q. Any other specific occasion.

"A. We were in apartments, different apartments every day. If it wasn't the washer, it would be this, it would be [fol. 101] a fuse, it would be something else in every apartment. I can't recollect what particular days I was in that apartment.

"Q. Do you recall this particular paint job in 1951 of Apartment 401 because Mr. Simons was away for a considerable period of time?

"A. Well, Mr. Simons had a habit of going away for a few days, if the place was painted. He didn't want to be around. That is all I remember.

"Q. Is there any other particular job that you remember doing in the Simons apartment other than this 1951 paint job, that you can pinpoint in terms of year or month?

"A. Big job, you mean?

"Q. Any job.

"A. I can't remember everything about it. Small jobs.

"Q. As far as your knowledge is concerned, sir, isn't it possible that Mr. Simons was not in the apartment during the entire month of March 1952?

[fol. 102] "A. He was not in the apartment?

"I don't understand it.

"Q. Mr. Weber, I want you to understand and I will try to explain what I am talking about.

"As far as you know, isn't it possible that Mr. Simons was not in his apartment at all for the entire month of March 1952?

"A. Not the entire month.

"Q. Mr. Weber, you just took some sort of a pill, didn't you?

"A. Yes.

"Q. What kind of pill is that?

"A. It could be an aspirin that she gave me. I think it was an aspirin.

"Q. Are you regularly under medication?

"A. No, Not now. I was two years ago with my back. They took X-rays of it.

"Q. Are you under a sedative of any type at this time?

"A. No, no. The only thing is, as I say, it catches me in [fol. 103] my back when I go to walk and that is the only thing I can say.

"Q. Do you remember when during the month of March 1952 that Mr. Simons was not in his apartment?

"A. I couldn't remember anything, what particular date he wasn't in his apartment.

"Q. What period of time was he absent?

"A. He never was away more than from a week to ten days the most, to my knowledge, my experience with him, in the years I knew him.

"Q. You have recalled an incident before 1951 when Mr. Simons asked you not to let Mrs. Simons in the apartment; do you remember that?

"A. I remember that particular day.

"Q. You say you remember the day. Can you give us the date?

"A. No, I don't remember the day. I remember when she came in, that is all I know.

"Q. You remember the incident?

"A. That is all.

[fol. 104] "Q. Did you let her in the apartment?

"A. I finally let her in. I thought—the reason why I let her in, after all, what right would I have to keep her out? She was still Mrs. Simons to me. And he bawled me out, naturally. He said, 'I told you not to let her in.'

"I said, 'She's Mrs. Simons to me. I can't keep her in the hall.'

"Q. But you had resisted letting her in for some time; is that right?

"A. I had what?

"Q. Did you let her in immediately?

"A. No. She begged me to go in. She wanted to get in.

"Q. Did she threaten you?

"A. No, she never threatened me.

"Q. Didn't she actually on that occasion threaten you with a police action?

"A. Oh, no. That wouldn't worry me. All I kept saying, 'Look, Mr. Simons told me not to let you in.'

"She kept this up until I finally let her in. He wasn't home.

[fol. 105] "Q. About how long did you hold out before you let her in?

"A. A good half-hour, maybe more, maybe an hour.

"Q. During that half to one hour period you constantly conversed with her at that time?

"A. I didn't converse with her. I sat in the office and she came back and forth.

"Q. Was she mad?

"A. She wasn't angry. She wasn't the type to be upset, angry, mad.

"Q. After that occasion, which you recollect, the very next time you saw her was when she came to your house in Long Island a couple of months ago from today?

"A. That was the last time—the first time I saw her since she left 69-10 Yellowstone, the first time I saw Mrs. Simons.

"Q. I want to get this clear and then we are through. You remember this occasion when she wanted to get in the apartment, and that was before 1951; is that right?

"A. That, I don't know.

[fol. 106] "Q. You remember this incident when she wanted to get in the apartment and you finally let her in?

"A. I remember that, yes.

"Q. That was before the paint job in 1951?

"A. That's right.

"Q. When was the next time after that, sir, that you saw Miss Simons?

"A. I haven't seen her until a couple of months ago."

The Court: That is the point I was making. It is useless and foolish, I think, to waste that much time.

After you asked about letting her in prior to the 1951 paint job, I started counting, and there were sixteen more different times you asked that.

I think we ought to go ahead and do what is pertinent, but asking the same question and getting the same answer twenty or thirty times does not add anything.

Mr. Levenson: He changed around.

The Court: He did not change. It was before the 1951 paint job.

Mr. Ward: A great many of these are the same way. We will try to cut them down as close as we can.

[fol. 107] The next one I want is Arthur Joseph Meyers. Here are all the originals, Your Honor [indicating].

COLLOQUY BETWEEN COURT AND COUNSEL

As I understand it, Your Honor, an order has been announced by the Court admitting all of these into evidence for whatever purpose.

The Court: The depositions have already been filed.

Mr. Ward: They have been filed, so they are open when filed under the rules.

Mr. Sibley: They are not in evidence until they are offered.

The Court: That is right.

Mr. Rosenberg: We have a stipulation.

Mr. Ward: We are offering it in evidence by reading the questions and answers.

Mr. Sibley: We have not specified what witness deposition, if You: Honor please. It has not been specified in the record what witness deposition is being offered, unless the Court's statement that you offer all except the witnesses present in court.

The Court: What I stated was that the depositions of all witnesses other than those present may be offered into evidence subject to objection only as to materiality.

[fol. 108] So far they offered one of William H. Weber. Now they are offering one of Arthur Joseph Meyers.

Up to this point, those are the only two that have been offered in evidence.

Mr. Ward: This was a deposition taken on the fifteenth day of June, 1962, and beginning on page 3, Your Honor. He lived in Queens, New York.

I will start at the bottom of page 3.

"Q. When for the first time did you come upon premises 69-10 Yellowstone Boulevard, Forest Hills?

"A. The first of April 1943.

"Q. In what capacity?

"A. As a doorman, night doorman.

"Q. What were your hours there?

"A. From 7 to 7 at that time.

"Q. When you say 7, 7 p.m. to 7 a.m.?

"A. Yes.

"Q. When did you leave the said premises or retire from the said job?

"A. 1960, the 4th of February.

"Q. While you were on the premises, did you know a Mr. Sol Simons?

"A. Yes, I did.

[fol. 109] "Q. Did he reside in said apartment house?

"A. Yes, sir.

"Q. Do you remember the room number that he resided in?

"A. Yes, sir, 401, on the fourth floor.

"Q. In October, November and December of 1951, did you see Sol Simons in the premises?

"A. I did.

"Q. Did Sol Simons leave the premises at any time, his apartment at any time for a period of time during that period of time?

"A. Oh, yes, he did.

"Q. What period of time would you say he was away from the premises in October, November and December of 1951?

"A. About no longer than four weeks.

"Q. No longer than four weeks?

"A. Four weeks at a time.

"Q. In January, February and March of 1952, did you see Mr. Simons?

"A. I did.

[fol. 110] "Q. For what period of time would you say he left said premises?

"A. Well, no longer—there was no period longer than four weeks.

"Q. Did you render any particular services to Sol Simons?

"A. I did.

"Q. Will you tell me—

"A. I serviced his car in the garage, and I also signed for his registered mail and held it he'd come in each time and he'd sign for it each time that he came in.

"Q. When you first came upon the premises, was Sol Simons living there?

"A. He was.

"Q. In the same apartment?

"A. The same apartment.

"Q. When you left the premises and retired on February 4, 1960—is that right?

"A. He was still there—

"Q. —did he live there?

"A. He still lived there.

"Q. He had the same apartment?

[fol. 111] "A. The same apartment all the time. He never changed."

There was cross examination.

By Mr. Levenson:

"Q. How old are you?

"A. I'm eighty-two.

"Q. When were you born?

"A. 19th of March, 1980 in Trenton, New Jersey.

"Mr. Gertler: 1880 you mean.

"The Witness: 1880, in Trenton, New Jersey, 19th of March.

"Q. What education have you had?

"A. Just public school institution.

"Q. In New Jersey?

"A. Well, a part in New Jersey and a part in Brooklyn.

"Q. To what grade school did you complete?

"A. I finished public school.

"Q. In 1953, when you took this job as night doorman I calculate that you were 61 years old.

"A. No, 63.

"Q. 63 years old?

[fol. 112] "A. 63 years, yes, sir.

"Q. What other employment had you had prior to that?

"A. Well, I worked for—before that, I worked for Dr. Rogers for ten years.

"Q. In what capacity?

"A. As a butler.

"Q. What is Dr. Rogers' full name and address?

"A. Well, he's deceased now, but he was in 680—when I worked for him, he was 680 St. Johns Place, in Brooklyn.

"Q. New York City?

"A. Yes.

"Q. What was Dr. Rogers' full name?

"A. Well, now, I couldn't give you—Dr. Robert Rogers.

"Q. Robert Rogers?

"A. He was an eye specialist. And he was attached to the Long Island College Hospital and Coney Island Hospital. He did his operations in Long Island College. He was a staff man there in Long Island College.

"Q. Before you took that employment with Dr. Rogers, [fol. 113] what did you do?

"A. I was a chauffeur for Mr. Hadden.

"Q. Give me his full name.

"A. And he is the president of the Brooklyn Savings Bank. I worked for him as a chauffeur for 19 years.

"Q. What is his full name?

"A. That's a little—that's a little long ways back. I can't exactly tell you his full name. But—

"Q. Where is the bank that he was president of located?

"A. Pierrepont Street and Clinton Street in Brooklyn. Corner of Pierrepont and Brooklyn.

"Q. Is he still alive?

"A. No, sir, he's deceased.

"Q. Are you retired?

"A. I am retired, yes, sir.

"Q. Do you have retirement income?

"A. I have social security.

"Q. Is that the only source of income that you have?

"A. Yes, sir.

[fol. 114] "Q. Have you been offered any money for appearing and testifying here today?

"A. No, sir.

"Q. Not even expenses?

"A. Yes, expenses, yes.

"Q. How much have you gotten for expenses?

"A. Just my carfare backwards and forwards to Queens.

"Q. How much?

"A. Well, it costs me 60 cents each way. I mean 60 cents to come and 60 cents to go.

"Q. You have been paid $1.20?

"A. Yes.

"Q. That is all you have been paid?

"A. That's all.

"Q. Have you ever been here before?

"A. Just once.

"Q. You were here once before?

"A. Once before, yes.

"Q. To talk to Mr. Gertler?

"A. Yes, sir.

"Q. When was that?

[fol. 115] "A. That was—let's see. I think it is two weeks ago last Thursday or three weeks. Something like that. I can't exactly remember just the date.

"Q. Three weeks ago?

"A. I think it is about three weeks ago.

"Q. How long did you stay here?

"A. Just a short time, about a half hour, three-quarters of an hour, something like that.

"Q. When you came here on that occasion, did you come from your place of residence in Queens?

"A. I did.

"Q. Did you go directly back?

"A. Yes, sir.

"Q. Were you paid on that occasion $1.20?

"A. Yes, I was.

"Q. So you have been paid a total of $2.40?

"A. Yes.

"Q. Is that the only remuneration or compensation that [fol. 116] you expect?

"A. Yes.

"Q. Have you been promised any other remuneration or compensation?

"A. No, sir, nothing whatever.

"She just asked me if I would testify and I volunteered to testify.

"Q. She asked you?

"A. Pardon?

"Q. She? Who is she?

"A. Mrs. Simons.

"Q. Lucy C. Simons?

"A. Yes.

"Q. When did she ask you?

"A. The day before I came here.

"Q. About three weeks ago?

"A. Yes.

"Q. Did she come to your house?

"A. No, sir.

"Q. Where did you see her?

"A. I didn't see her. She telephoned me.

"Q. She called you on the phone?

"A. On the phone.

[fol. 117] "Q. She asked you to come?

"A. Yes.

"Q. Did she discuss with you then what she expected you to testify to?

"A. Well, just what I know, that's all.

"Q. What did she say to you, if you remember?

"A. She just asked me if I would testify. She said her husband said he wasn't living at the house, and I was to testify that he did live there from the time I came until the time I left.

"Q. She said that her husband said he didn't live there?

"A. That's what she said.

"Q. Do you know that he is dead?

"A. Oh, yes, I know that.

"Q. Did she tell you when he made this statement?

"A. No, she didn't.

"Q. She made an appointment with you then to come down and talk to Mr. Gertler, is that it?

[fol. 118] "A. Yes, sir.

"Q. You kept that appointment?

"A. I kept that appointment.

"Q. She never promised to compensate you or remunerate you other than for—

"A. She just said that I would have my expenses paid. And that's what I get, my expenses, backwards and forwards, that's all.

"I came by the bus from my house to the elevator there in Jamaica and took the train and came here. I don't expect any more than what I paid out.

"Q. Who took your place when you left the 69-10 Yellowstone Boulevard apartment as night doorman in February of 1960?

"A. Well, I couldn't tell you that, because I was sick at the time and I didn't know. I was away from there a year before I even went back.

"Q. Have you visited the premises frequently since you retired?

"A. Yes, I have.

"Q. Who is currently the superintendent of the building?

[fol. 119] "A. It is a new superintendent. I don't know nothing about him.

"Q. Do you know his name?

"A. No, I don't. I never worked under him. The man I worked under is not there now.

"Q. What is his name?

"A. Mr. Meistrow.

"Q. You don't know the current superintendent?

"A. The one that I served under?

"Q. No, the one that is currently there.

"Mr. Gertler: Presently. The present one he means.

"A. No, not present, no.

"Q. Does the name Al Carewe strike a bell?

"A. No, I don't know nobody by that name.

"Q. Do you know Al, the superintendent?

"A. You mean the superintendent there now?

[fol. 120] "Q. Yes.

"A. I've met him, but I don't know him—

"Q. Al?

"A. I don't know his name. I just went there—I was there the day before yesterday and I met him, and he was making some arrangement for a relief man. And I had a young man that was going to go in and relieve his night man.

"Q. How frequently do you go back there?

"A. Not very often.

"Q. When was the last time you were there?

"A. Three days ago.

"Q. Three days ago?

"A. Yes, sir.

"Q. Would that be on Monday or Tuesday?

"A. Wait a minute now. No, wait a minute. It ain't three days ago, because it was the day before yesterday I was there.

"Q. The day before yesterday would be—

"A. Yes, the day before yesterday.

[fol. 121] "Q. —Wednesday?

"A. Wednesday, I was there.

"Q. That would be the 13th of June?

"A. Yes, that's correct.

"Q. That is the last time?

"A. That's the last time I was there.

"Q. When you were there, did you talk to anyone?

"A. No, nobody—I spoke to the super.

"Q. Al?

"A. Al. And then I went upstairs to see a couple of the tenants that I know.

"Q. Who are they?

"A. I went to see Mr. Franks. He lives in 624.

"Q. Anyone else?

"A. Nobody else.

"Q. You went to visit Mr. Franks and you spoke to Al, the super?

"A. Yes, I spoke to him on account of the man that he was—that I had been there to see him about.

"And a week ago before this, see, I was there and I spoke [fol. 122] to him about a relief man. And I went to tell him the relief man wouldn't be able to come on Friday because he had got a job in the airplane place out on the Island.

"So, he said, 'Well, they won't pay—they wouldn't pay for a man anyway, so it is a good thing you come and told me.'

"Q. You just went there for that purpose?

"A. Yes, I went there for that purpose.

"Q. Why didn't you call?

"A. Well, I could have called. But it was better to take the man and let him see him. I took the man over.

"Q. Last Wednesday?

"A. Yes. You see I took the man over to see him so he'd know what kind of a man he was.

"Q. Did you talk to anyone else when you were there last Wednesday?

"A. No, no.

"Q. When you worked there, you were night doorman [fol. 123] from 7 p.m. to 7 a.m.?

"A. Yes, sir.

"Q. Was there a day doorman from 7 a.m. to 7 p.m.?

"A. Yes, there was.

"Q. Who was that?

"A. Well, there were several men there. One fellow is deceased, and, oh, there's been any amount of men there since I've been there.

"Q. Can you name them?

"A. Well, one fellow is named John, and there is a man on there now—

"Q. Not now.

"A. Oh, not now?

"Q. Not now.

"A. No, I can't name—

"Q. When you were night man, who were the day men? Let us start with 1943.

"A. 1943, the day man was John—I can't remember his name. His name is John. I can't remember—

"Q. Do you know his address?

"A. No, he's deceased, too.

[fol. 124]"Q. So John is dead. When did John die?

"A. He died in 1948.

"Q. Was he the day man until 1948?

"A. Yes.

"Q. After 1948, who was the day man?

"A. That's kind of—that's a kind of ticklish question because they changed quite often on doormen. Doormen didn't stay very long.

"Q. Who was the day doorman in 1951?

"A. 1951. That I can't recall that exactly because so many men come and go there. I couldn't recall.

"Q. You don't remember the day doorman in 1951?

"A. No, I don't.

"Q. In the normal course of your occupation, you used to see that man at least twice a day, when he relieved you and when you relieved him, is that right?

"A. Yes. No, I only—yes, I'd see him when he'd come on in the morning.

"Q. And when you went at night?

[fol. 125] "A. When I'd come on at night, he would be on.

"Q. So, you saw that man at least twice a day?

"A. Twice a day.

"Q. And you can't remember his name?

"A. No, I can't remember all the names because—

"Q. His name. Not all the names. His name.

"A. No, his name, no, I can't.

"Q. Let us deal with 1952.

"Who was the day man in that year?

"A. Now, that's a thing I didn't keep track of it.

"Q. You don't know his name either?

"A. I'll tell you the truth about it. I didn't associate with any of the help in the house outside of speaking to them—

"Q. I did not ask you whether you associated—

"A. I'm saying, if you—

"Q. You saw him twice a day?

"A. I seen him twice a day.

[fol. 126] "Q. When you relieved him and he relieved you?

"A. Yes.

"Q. You don't know his name?

"A. No.

"Q. In 1953, what was the name of the day man? You don't know?

"A. I don't know. I can't remember who he was.

"Q. Let us deal with 1954.

"A. 1954?

"Q. Do you have any better luck with that year?

"A. No, I haven't.

"Q. In 1955?

"A. No, I don't remember the day man then either.

"Q. 1956?

"A. No, I don't remember any of them very well.

"Q. 1957?

"A. I don't remember any of them, to tell you the truth. Only the last one is on there, is on there—

[fol. 127] "Q. Wait a second.

"A. Yes.

"Q. You don't remember him from 1956, 1957?

"A. Yes, 1957, I do remember. There is a fellow there by the name of Al Smith.

"Q. Al Smith?

"A. And he's still on the door there now.

"Q. In the daytime?

"A. In the daytime.

"Q. He started in 1957?

"A. Yes.

"Q. And he is still there to this day?

"A. Yes, sir.

"Q. Never any replacement or interruptions in his employment?

"A. Not in between, no.

"Q. So the last one you can remember is the one that is still there and his name is Al Smith?

"A. Yes, he's the one that I left there and he is still there.

"Q. Where does Al Smith live?

[fol. 128] "A. He don't give anybody his address. I don't know. You'd have to get that from the superintendent.

"Q. Who is the night man that took over when you left?

"A. Well, I told you that before. I answered that before. I told you I didn't know.

"I was sick for a year and I didn't get back there for a year, and they had changed a couple of times then. So, I couldn't tell you who took over my place.

"Q. Are you absolutely positive that the day doorman's name is Al Smith?

"A. I'm quite sure it is.

"Q. It has been since 1957?

"A. Yes.

"Q. Did you ever hear of a day doorman named John?

"A. Yes, I've heard a day—I don't know—yes, I heard of a day man by the name of John. That was the first man that came—that was there when I came there.

"Q. John?

[fol. 129] "A. Yes, his name was John.

"Q. He is not there any more?

"A. No, he's deceased.

"Q. But he came around—he's deceased?

"A. Yes, he's dead. That John is dead. That's the man that was there when I first came there. He was there for about eight years.

"Q. There is no John the day doorman there now?

"A. Well, I don't know. I know his last name is Smith anyhow. I don't remember his first name. I think it is John. I'm quite sure it is John.

"Q. Not Al? His name is John Smith, not Al?

"A. As far as I know, that's what I know him by. I don't know him by Al. He's still on the door, whatever his name is.

"Q. The last time you went back there on Wednesday, June 13, you did not speak to John, did you?

"A. Yes, I did.

"Q. You did?

[fol. 130] "A. I spoke to him, yes.

"Q. What did you say to John?

"A. I just spoke to him and said hello to him.

"Q. Is that all you said to John?

"A. That's all.

"Q. Prior to the 13th, last Wednesday, when was the last time before that you were back?

"A. I was back about a week before that, when I made the arrangements for this—I took this man with me to make arrangements to relieve that man that's on there now. He was going on his vacation for a week.

"Q. It was a week—

"A. So, he decided that he wouldn't go.

"So, in the meantime, the young man that I was taking over there was to go to work today. And he got a job over in the airplane place in Long Island City, and he couldn't go.

"So, I went there to inform him that he wasn't coming on the 13th.

[fol. 131] "Q. What day of the week was it when you were there before last Wednesday?

"A. It was on a Monday.

"Q. On a Monday?

"A. On a Monday, yes.

"Q. It was not the immediately preceding Monday, but a Monday a week back?

"A. Yes, Monday a week back.

"Q. That would be June 4?

"A. That's right.

"Q. Who did you speak to on that occasion?

"A. I spoke to the super.

"Q. Al?

"A. Al. The super who is there now.

"Q. Did you speak to John?

"A. I just spoke to him as I come in when I seen him, yes. And he told him about his vacation, and that's how I came to speak of this man.

"Q. Did you talk to anyone else?

"A. No.

"Q. Before that, when was the last time you were there?

[fol. 132] "A. Right after Christmas, two days after Christmas.

"Q. After Lucy C. Simons called you and asked you if you would testify, you were back at the premises on two occasions, June 4 and June 13?

"A. Yes.

"Q. You recollect on both those occasions that you had a conversation with Al, the super, and with John, the doorman?

"A. No, Al the super wasn't there at that time. The other man was dismissed right after—two days after Christmas. They had no superintendent at that time.

"Q. No, no, I mean June 4 and June 13 occasions.

"On those two occasions, you spoke to both Al and the doorman?

"A. And the doorman, yes.

"Q. And in addition to that, you spoke to Mr. Franks on the 13th?

"A. Yes.

"Q. No one else?

"A. Nobody else.

[fol. 133] "I wouldn't say nobody else, because I'm a man who is well known over there. I know everybody in the house and people came in and speak to me.

"As far as that's concerned, I wouldn't say I didn't speak to nobody else because people come up and glad to see me, and ask me how I'm doing. I wouldn't say I didn't.

"Q. When you went back on those two occasions and you talked to Al and to John, did you discuss with them the fact that Lucy C. Simons had called you and asked you to testify in a matter for her?

"A. No, I didn't.

"Q. You didn't discuss that with any of them?

"A. No one.

"Q. Not a single solitary word about it?

"A. No, sir.

"Q. When Lucy C. Simons called you, did you recognize who she was?

"A. Yes, she told me who she was. I didn't recognize [fol. 134] her.

"Q. You didn't remember?

"A. I remember her, but I didn't—I wouldn't know her voice that long.

"Q. When had you first met her?

"A. In 1943.

"Q. In 1943?

"A. Yes.

"Q. When was the last time you saw her?

"A. The night she left.

"Q. When was that?

"A. That was in the fall of the year.

"Q. Which year?

"A. 1951.

"Q. Did you ever see her again after that?

"A No.

"Q. So the very last time that you ever cast your eyes on Lucy C. Simons was in the fall of 1951?

"A. That's correct.

"Q. You are positive about that?

"A. Positive of it.

[fol. 135] "Q. Other than this phone call that you got from her approximately three weeks ago, had you ever spoken to her after the fall of 1951?

"A. No.

"Q. So the very last time that you either saw or spoke to her was in the fall of 1951?

"A. Yes.

"Q. And you are positive about that?

"A. Yes, sir.

"Q. How many tenants resided in the building at which you were night doorman?

"A. One hundred fifty-six.

"Q. That's the number of apartments?

"A. Yes, that's the number—of course, naturally, each apartment is supposed to have a family in it. I don't know nothing else about that part.

"Q. There are 156 apartments?

"A. Yes. And one is the super's apartment is located in that.

"Q. Approximately, if you know, how many tenants were [fol. 136] there living in that building?

"A. It was in the thousands.

"Q. Thousands?

"A. Yes, sir. It was over a thousand people.

"Q. Over a thousand?

"A. Yes.

"Q. Were you able to keep up with and keep track of all of them?

"A. Yes, on account of the switchboard had the names on them. They had a switchboard as you come in the door, and they were all registered in that register and you had to keep track of it.

"And when they would ring for another family to want to speak, you just connected. You would ring the bell and they'd get connected.

"Q. That is not what I meant.

"Did you keep up with their comings and goings?

"A. Most of them, yes. Especially if they had cars, because I worked in the garage also. I had—did work in

[fol. 137] the garage also. That way, I kept pretty well in track of them.

"Q. On given days and given months, are you able to remember the comings and goings of the thousand or some people that lived in that building?

"A. No, not all of them. I wouldn't say I remembered all of them, but the ones I had contact with, where I carried their baggage down when they went away and the ones I carried the baggage back when they'd come in. But everybody—you coudn't keep track of all them people.

"Q. I should say not.

"A. No. But the ones that I'd come in contact with that had cars in the garage, yes, I can keep track of them.

"Q. You can?

"A. Yes.

"Q. How do you remember Sol Simons so well?

"A. For the simple reason I used to— He went to the Post Office and he assigned me to sign for all his regis-[fol. 138] tered mail that came for him.

"Q. He gave you the power of attorney to do that?

"A. No, he didn't, but he had to go to the Post Office and told them that I was to take the mail. And the mailman came in, and when he'd give it to me, I'd sign for it.

"Q. You knew the mailman pretty good?

"A. Yes, I know the mailman by the name of Eddie. I don't know his last name, but his first name was Eddie.

"He was there when I came there, and he is still there as a mailman.

"And when Mr. Simons would come in, I would give it to him. And then when I'd give him the mail, I had him sign for what mail he got, because I signed for it when it come in. That's how I could keep track of that part of it.

"Q. So you signed for Sol Simons' mail?

"A. His registered mail.

"Q. You know, don't you, that he had a lady who stayed [fol. 139] in his apartment?

"A. Well, I ain't going to answer that.

"Q. Did he?

"A. I wouldn't answer that. I am not—

"Q. He had a housekeeper there, didn't he?

"A. Well, we say he had a housekeeper.

"Q. He had a housekeeper?

"A. And he had a maid that come in and took care of the apartment also. That's all I know.

"Q. He assigned you as the one to sign for his mail and not his housekeeper?

"A. Not his housekeeper. Well, the idea was this: She wasn't always there. Now, that lady that he had there worked for the telephone company, and she wasn't there when the mail come in the morning. So, I mean—

"Q. What was the name of his maid?

"A. Anna, I think. She is an elderly lady. Mary her [fol. 140] name was.

"Q. Mary?

"A. Yes. I don't know her last name. I know her first name is Mary.

"Q. Were you ever on duty during the daytime?

"A. The only time I worked there on the daytime, the super was there had a—this is after I was taken sick and I got better. He had me come back and work three weeks on the door during the summer.

"I relieved a handyman—I went in the handyman's place to—on the door, and the man that was on the door was on the handyman's job. And I put in three weeks after that, you see.

"Q. So during the period after April 1, 1943 to February 4, 1960, you worked on the door during the day for a three-week period?

"A. No, no, no. This is after I retired.

"Q. After you retired?

"A. After I retired I went back to three weeks and [fol. 141] worked in a man's place to keep him from hiring another man. He couldn't hire another man for the three weeks, and I went back and put in three weeks.

"Q. I follow you. But let's stick to this April 1, 1943 to February 4, 1960 period.

"Did you ever work on the door during the day that time?

"A. No, never.

"Q. Never once?

"A. Never.

"Q. Will you tell me if it is a practice in Forest Hills as far as you know for the mail to be delivered during the night?

"A. It was delivered—it was delivered in the morning.

"Q. Delivered in the morning?

"A. Yes.

"Q. The mail was delivered to that building before you left at 7:00 a.m.?

"A. Well, I didn't always leave at 7:00 a.m. That's the [fol. 142] idea. I worked in the garage.

"And if I put in a little extra time, I was doing it on my own.

"Q. Is it your testimony that when the mailman came there during the day, he would call for you in the garage to find Sol Simons' mail?

"A. Sure. He wouldn't give it to nobody else.

"Q. How frequently did you work in the garage?

"A. Every night I was there. I worked in the garage also.

"Q. How many times was it your custom to work after 7:00 a.m. in the garage?

"A. Practically all the time.

"Q. How many hours did you put in the garage?

"A. Well, anywheres from seven to eight hours.

"Q. So, you worked from 7:00 a.m.—

[fol. 143] "Mr. Gertler: Seven or eight hours a day or week?

"The Witness: Wait a minute.

"Mr. Levenson: Let him testify.

"Mr. Gertler: One moment. Let's get this clear. We want facts.

"The Witness: This was the setup: I went there as a doorman, and they gave me permission to work in the garage to service any cars I could service.

"And if I worked overtime, that was on my own. They give me—told me I had to keep the garage clean. I could do what I wanted in the garage. And I used to work overtime because it was to my advantage. They didn't pay me for the overtime, but I had got paid for the people's cars I took care of.

"Q. Your regular hours were 7 p.m. to 7 a.m.?

"A. Yes.

"Q. How frequently would you stay after 7 a.m. to work in the garage?

"A. Pretty near every day.

"Q. Every day?

"A. Sunday it would be later. After Saturday night, it [fol. 144] would be later.

"Q. How long would you stay in the garage after you worked twelve hours?

"A. That was included in—I went in the garage at 12:00 o'clock. I started at 12:00 o'clock in the garage, which the—

"Q. 12 o'clock when, noon?

"A. At night.

"Q. You started 12 o'clock at night in the garage?

"A. Yes.

"Q. When did you leave the premises to go home to rest?

"A. Generally around 8:00 or half past 8:00 in the morning. I always stayed until the mailman came. I was always working in the garage until the mailman came.

"Q. Did you sign for anybody else's mail other than Sol Simons?

"A. No, I didn't sign for other people's mail, but I took other people's mail that was away.

"Q. The day man didn't take it but you did?

[fol. 145] "A. I did. I was supposed to take his mail.

"He told me to sign for it, and he took to the Post Office and made that arrangement.

"Q. You stayed every working day of your life until 8:30 a.m. to get his mail?

"A. What do you mean 'my life'? What do you mean by that?

"Q. I want to know what you mean.

"A. I want to know what you—you said 'my life.' I worked there seventeen years and a half, and I put anywheres from twelve to fourteen hours in on that job.

"But that didn't have nothing to do with my seven hours. If I put three or four hours in overtime, that was to my advantage.

"Q. So you worked a twelve-hour day and you stayed regularly an extra hour and a half just to get Sol Simons' mail?

"A. I did.

"Q. Did he pay you for that?

"A. Sure he paid me for it.

[fol. 146] "Q. How much did he pay you for it?

"A. Well, he'd give me $2 or $3 at a time.

"Q. How frequently would he give you $2 or $3?

"A. Every time he'd come back when he'd pick up the mail.

"Q. So you spent an extra hour and a half every day after working a full twelve-hour day to get $1.50 or $2?

"A. Well, what if I did? What's wrong with that?

"Q. You liked Sol Simons?

"A. I liked him. He was a nice man. I had nothing against him. He was a nice man. He always treated me nice, and I always tried to return the compliment to him.

"Q. What time of day was the mail delivered?

"A. At 8:00 o'clock it was delivered.

"Q. At 8:00 o'clock?

"A. At 8:00 o'clock.

"Q. What was the name of the mailman that delivered [fol. 147] it to you?

"A. A fellow by the name of— His name is Eddie. I don't know his last name.

"Q. If I told you his name was Eddie Mandeville—

"A. I don't know his last name. I just know him by Eddie.

"Q. You do not know his actual name is Edgar A. Mandeville?

"A. No, I don't.

"Q. Is it your testimony that the postman, Eddie, would seek you out and give you Sol Simons' mail?

"A. He would.

"Q. Are you sure of that?

"A. Sure I'm sure of it. Why should I say it if it wasn't the truth? I'm telling the truth.

"Q. That is what we are getting at.

"A. Sure, I am.

"Q. You are?

"A. I am telling you the truth.

"Q. You are telling me the gospel truth?

"A. That's right. I wouldn't put my right hand up for [fol. 148] no lie. I wouldn't tell you no lie. I'm telling you the gospel truth. I put that time in.

"Q. For $1.50 or $2?

"A. Well, considering the man had always tipped me for taking his baggage backwards and forwards. I brought—he used to leave at midnight. He never left—on any trip, around midnight, and when he'd come back, he'd come back 2:00 or 3:00 in the morning.

"And I'd—he'd bring his car in the garage and leave it on the floor. I'd take his bags up and he'd pay me for taking his bags up.

"And then I'd come back and put his car away, put in his space.

"Q. He would go away for periods of four weeks at a time is your testimony?

"A. Yes.

"Q. Never more?

"A. Never more as I know in my time.

"Q. How do you remember with such great particularity [fol. 149] the months of October, November and December of 1951 in regard to the comings and goings of Sol Simons?

"A. Well, I serviced his car. He paid me by the month. And it never went over the months. He always paid me on the first of the month and it never run over the month.

"Q. He paid you personally?

"A. Yes.

"Q. He paid you how, by check or cash?

"A. By check.

"Q. By check?

"A. Yes.

"Q. Every time he gave you any money it was by check?

"A. No, no, he paid for the car by check, but the other money wasn't by check.

"Q. The mail money wasn't by check?

"A. No.

"Q. That was cash?

"A. That was cash.

"Q. So there would be no record of that?

"A. No, there would be no record of that.

"Q. Tell me, if you will, why and how you remember [fol. 150] October, November and December of 1951 in regard to Sol Simons' comings and goings so well.

"A. Well, what would stop me from remembering it? I remembered it from the mail, his mail that I kept for him.

"And he signed—I had him sign for it, because I signed for his registered mail, and I made him sign when he got back.

"Q. Tell me on what day or days in October he was present or not present in Forest Hills.

"A. Well, now, I couldn't tell you that exactly, the dates exactly.

"Q. Was he there during the month of October 1951?

"A. Yes, he was.

"Q. How do you know that?

"A. Because he was there when he paid me on the first. He paid me on the first of the month.

"Q. Therefore, you know he was there the whole month? [fol. 151] "A. I didn't say he was there the whole month.

"Q. When wasn't he there?

"A. Well, when he'd go away.

"Q. When did he go away

"A. Well, I couldn't give you the periods of time when he'd go away. He might come and stay two weeks and then go away.

"Q. In truth, in fact, you don't know whether he was there or not there in October 1951, do you?

"A. Yes, I do.

"Q. You swear your life that you know?

"A. Yes, I do.

"Q. When was he there?

"A. He was there on the first.

"Q. He was there on the first of October?

"A. He paid me on the first of October, he paid me.

"Q. 1951?

"A. Yes.

"And he went away in about two weeks' time and he come back by the first—and by the first of the month he was

back and paid me again. And he would collect his mail.
[fol. 152] "And how can I know so well about it, I used to take the mail home because they had a locker in the office where people had pass keys for the closet, and I didn't—anything I signed for, I wouldn't leave in the closet. I was responsible for it, so I used to take it backwards and forwards home.

"Q. Every day you would bring it back and forth?

"A. Yes, bring his mail, and around—when it would come time for him to be back, generally around three weeks or four weeks, I'd bring it all back. When he'd come, he'd have it.

"Q. Can you tell us when exactly during the month of October he was there?

"A. He was there in the middle of the month.

"Q. He was there in the middle of the month?

"A. Yes.

"Q. What day?

[fol. 153] "A. I couldn't tell you. I couldn't tell you—

"Q. How do you know he was there in the middle of the month?

"A. Because I know.

"Q. How?

"A. Well, the man come and go. I'd—I serviced his car. And I seen him come in and out every day—

"Q. How many cars did you service?

"A. I serviced two. He had one on the street.

"Q. You serviced two cars?

"A. Two cars.

"Q. They both belonged to him?

"A. No, no. I don't know whether both of them belonged to him. But he had a Buick and a Cadillac, and the Buick he kept on the street, and I used to clean that once in a while.

"Q. Are they the only two cars you serviced in the whole building?

"A. No, no.

"Q. How many cars did you service in the whole building?

[fol. 154] "A. Well, anywheres in the neighborhood of twenty cars.

"Q. Did any of those other guests or tenants come and go in that building?

"A. Sure.

"Q. Who else was not present in that building in 1951?

"A. No, I ain't going to answer that.

"Q. Do you know if anybody else was gone during that month?

"A. No, I couldn't say if there was.

"Q. How do you know that he was?

"A. I answered that question once and I don't intend to answer it again.

"Q. You don't?

"A. No, sir.

"Q. The reason you don't intend to answer it is because you can't, is that right?

"A. That ain't so. But I ain't just going to answer it.

"I told you all I know, and if that don't suit you, why, that's up to you.

"Q. No, it is up to you.

[fol. 155] "A. No, it ain't up to me.

"Q. It is your truthfulness that is in question, not mine.

"A. Well, I don't have to lie for nobody.

"Q. Then, why are you?

"A. I ain't lying. You can't prove that I'm lying. Now, you prove that I'm lying, if you can.

"Q. We are going to do that, sir.

"A. Well, you are going to have to do it.

"Q. Let us deal with the month of November 1951.

"When was Sol Simons present in Forest Hills at the apartment?

"A. He was present—he left one week before Christmas.

"Q. That is December. Let us deal with November.

"A. No, I don't—I'm dealing with—I'm telling you what I know. He left the week before Christmas, and he came back two weeks after the first of the year.

[fol. 156] "And he paid me in advance for his car and paid me—gave me $5 for Christmas.

"Q. Then according to your—

"A. Now, I know all that. I'm not guessing on that. I know that.

"Q. Positively?

"A. Positively.

"Q. Then it is your testimony that he was present at his apartment in Forest Hills during the entire month of November 1951, and most of the month of December 1951, and left shortly before Christmas?

"A. I didn't say that.

"Q. What did you say? I don't get it.

"A. You questioned me about the month. I told you that he left on two weeks after the first of the month, not before.

"Q. Which month?

"A. The month before. Christmas month. He wasn't there the whole month. I'm not saying he was there any month the full month.

"Q. Mr. Meyers, let us make this easy on all of us.

[fol. 157] "A. Yes, make it easy.

"Q. Let us start with the first of November of 1951.

"Was he there then?

"A. Yes.

"Q. How long did he stay there before he left to go some place?

"A. Two weeks.

"Q. Two weeks?

"A. Yes.

"Q. He left around the 14th of November to go some place?

"A. Yes.

"Q. That is 1951?

"A. Yes.

"Q. Where did he go, if you know?

"A. He went to Florida.

"Q. How do you know?

"A. He told me.

"Q. When did he return?

"A. He returned four weeks later.

"Q. That would make it around the middle of December, is that correct?

"A. Yes.

[fol. 158] "Q. How long did he stay in Forest Hills before he left again?

"A. About a week.
"Q. About a week?
"A. A week.
"Q. So some time just shortly before Christmas he left?
"A. Yes.
"Q. Did he tell you where he was going?
"A. No, he didn't tell me where he was going then.
"Q. You do not know where he went?
"A. No, I don't know where he went.
"Q. When did he come back?
"A. He came back about four weeks later.
"Q. So he returned, according to your testimony, some time around the 20th of January?
"A. That's right.
"Q. How long did he stay then?
"A. Well, he never stayed over ten days, as a rule. He was always going on trips different places.
[fol. 159] "He was a broker, and he bought grapes all over the country and he went from one place to another.
"Q. How do you know that?
"A. Because he told me. And he always give me some of the products. It was wine and stuff that he bought grapes for. He bought fruit, like berries. He'd give me some of that.
"Q. He would give you samples?
"A. Samples. He'd give me—
"Q. A pretty nice fellow?
"A. He was. There was nothing wrong with him. Not that I know of.
"Q. You got him back in Forest Hills approximately January 20, 1952.
"A. Yes.
"Q. When did he leave again?
"A. He never— I told you, he never stayed over ten days before he started on another trip. I don't know where he went.
"Q. That is general. I don't want to deal in generalities. When did he leave after that again, as best you know?
[fol. 160] "A. The best I know is about ten days.

"Q. That would make it on the 30th of January he left?

"A. Yes, probably—practically, it would be.

"Q. Where did he go, if you know?

"A. I don't know just where he went. He traveled. He flew all over different places.

"And sometimes he'd take the car and go to the places.

"Q. When did he come back?

"A. Well, that I can't tell you so much about that altogether. I couldn't spot it every time he went, to go and come. I couldn't spot that.

"Outside of the mail part. That's the only way I know.

"Q. You remember October, November, December and January.

"When did he come back after January 30, 1952? That is later, getting later on. You should remember that better.

[fol. 161] "A. I told you, he was never away over four weeks, and I'm going to stick to that, because that's true.

"Q. If that is what you know as the truth, you stick to it.

"A. Yes.

"Q. All we want is the truth.

"A. That's what I'm telling you.

"Q. When did he come back?

"A. I told you a minute ago, I couldn't spot all the times he went and come back.

"Q. You remember the others. How about remembering this?

"A. I couldn't tell you all the trips he made, but I know he wasn't gone—his mail would show for that.

"Q. When is it, in your testimony, that he returned after the 30th of January 1952?

"A. I've already told you that.

"Q. I didn't hear you.

"A. I ain't going to repeat that again. I told you that. [fol. 162] You don't cross-question me like that. It isn't necessary.

"I tell you one thing, and you are trying to twist me. You ain't going to twist me.

"Q. No, I'm not.

"A. I'm not going to let you do that.

"Q. No one is going to twist you.

"A. You are not smart enough to twist me like that.

"Q. I am not claiming to be.

"A. All right, then drop it right now, because I'm not going to answer anything else. I'm answering all I am going to answer.

"Q. You are through testifying?

"A. I'm through. That's my testimony. If you want it, all right. If you don't, it is all right with me.

"Q. You can't tell us, then, when he returned after January 30 of 1952?

"A. No, I told you all I knew, and I told you—I answered your question and now you come back and want me to [fol. 163] answer it again.

"Q. When during the month of February 1952 was Sol Simons present in Forest Hills?

"A. He was.

"Q. When?

"A. Well, I told you he was there every first of the month.

"Q. When after the first of February was Sol Simon not present in Forest Hills?

"Mr. Gertler: One moment. If you feel that you do not understand the question or do not know the answer, your answer is, 'No, I do not know, I don't remember,' or anything like that.

"You have a right to say that. You don't have to answer all questions. You answer to the best of your ability and answer honestly.

"The Witness: Sure, that's right.

"Mr. Gertler: If you remember, yes. If you don't, you don't.

"Mr. Levenson: He is an elderly gentleman, and—

"Mr. Gertler: The man, I think, has given me a sub- [fol. 164] stantial impression that he is a sincere, honest and pretty decent gentleman.

"The Witness: I am not out—

"Mr. Gertler: He is not a conniver.

"The Witness: I'm not a conniver. I am not looking for anything.

"Mr. Levenson: I have a job to do, Mr. Meyers.

"The Witness: I've got a job to do, and when I was there I did my job.

"Mr. Levenson: That is what I am trying to do.

"The Witness: The people were very nice to me, and that's the reason why I don't have to look for anything today.

"Mr. Gertler: All right, let us continue.

"Q. When after the first of February of 1952 did Sol Simons leave the apartment house in Forest Hills?

"A. Well, he did leave.

"Q. When? When during that month?

"A. I can't exactly spot the time. But he left. It was [fol. 165] around—I'd say it was around the middle of the month.

"Q. He left the middle of the month?

"A. Yes.

"Q. Do you know where he went?

"A. No, I don't.

"Q. Do you know when he returned?

"A. No, I couldn't spot that either, but he returned by the end of the month or a week—generally—he was generally there the first of the month. In between that, he would go on trips.

"Q. I understand you said that several times about generally.

"We are talking about February of 1952.

"A. Well, I couldn't give you—you know, I couldn't come down to dates. My memory ain't that good. But I know by the mail that he got.

"Q. By the mail that he got, you say he left somewhere around the middle of February of 1952.

"When did he return?

[fol. 166] "A. About four weeks later. It was just about four weeks later. Because the mail—I had almost four weeks' mail there.

"Q. When would that make it?

"A. Well, I couldn't exactly tell you that.

"Q. That would make it around the 14th of March that he returned?

"A. Yes, it would be around that time, something like that.

"Q. Is that your best recollection?

"A. The 10th of March, in and around that time. In between the 10th—

"Q. The period then of his return was somewhere between the 10th and the 15th, about there?

"A. Yes.

"Q. You remember that part definitely?

"A. Yes.

"Q. Are you sure about it?

"A. Yes.

"Q. You have sworn to it now?

"A. Yes.

"Q. You are absolutely positive?

[fol. 167] "A. Yes.

"Q. When after the 14th of March did he leave?

"A. Well, I can't exactly spot that. He'd generally stay about ten days. Sometimes ten days, sometimes a week.

"And then he'd go on another trip and come back. Sometimes he'd come back in two weeks, sometimes four weeks, but nothing over four weeks.

"Q. Let us try to stick to this month of March.

"You testified on direct about that. I just want to find out about that.

"You say after approximately the 14th of March he stayed ten days and then left?

"A. Yes.

"Q. So you would say he left then about the 24th or 25th of March, is that right, of 1952?

"A. No, I wouldn't say that. Because I told you once before he was always there the first of the month. He was [fol. 168] always there, and I got paid by check for that $6 he paid me by check for servicing his car.

"Q. I understand.

"A. And that he was always there on the first.

"Q. So he got back around the 10th to 14th, and when did he go again? When did he leave again?

"A. Well, that I couldn't tell you.

"But I'm telling you, he was always there on the first of the month. He would leave sometimes a week and sometimes he'd stay on ten days and go again.

"Q. Is it your testimony that he was there on the first of April?

"A. Yes.

"Q. He was in Forest Hills on the first of April 1952?

"A. Yes.

"Q. You are positive about that?

"A. I'm positive.

"Q. Absolutely?

"A. Yes, sir.

"Q. Then obviously from your testimony he came back [fol. 169] on the 14th of March, he stayed to the first of April or thereabouts and then left again?

"A. He left again, yes, sir.

"Q. When did he return after that, if you recollect?

"A. Well, I couldn't tell you when he returned after that.

"But he never was away too long at a time, because according to where he was going—

"Q. Was he back on the first day of May 1952?

"A. Yes.

"Q. You saw him?

"A. I saw him.

"Q. You are positive?

"A. Yes, sir.

"Q. Absolutely?

"A. Yes, sir.

"Q. Can you testify under oath with just as much certainty and positiveness about the whereabouts and the comings and goings of any other tenants in the building?

"A. A few I could, yes. A few.

[fol. 170] "Q. During the same period of time?

"A. Well, in that time—around that time, yes.

"Q. Will you tell us who they are?

"A. Well, I don't think it is necessary for me to answer that question. I don't want to involve nobody else in it.

"It ain't nece sary for me to tell you that, because that's involving someoody else. I don't involve other people.

"Q. Mr. Meyers, you are not the judge or the jury in this matter.

"A. I know.

"Q. You are just a witness.

"A. I know I'm just a witness, but I know my rights, too.

"Q. You refuse to tell me the name of any other tenant in the building whose comings and goings you know with as much certainty and positiveness as Sol Simons during the same period of time?

"A. I ain't going to answer that.

"Q. You refuse to answer?

"A. I refuse to answer that. I'm not going to involve [fol. 171] nobody else into it."

The Court: Read the rest of it.

Mr. Levenson: Page 55.

"Mr. Gertler: I will object to that question as being immaterial, irrelevant and incompetent and definitely bears no relation to the facts confronting us here.

"Mr. Levenson: Are you instructing him not to answer?

"Mr. Gertler: I am not instructing him not to answer.

"I am merely going on record as stating that this information you seek is immaterial, irrelevant and incompetent."

The Court: The objection is sustained.

Go ahead.

Mr. Levenson: "Mr. Gertler: I am not instructing him not an answer.

"I am merely going on record as stating that this information you seek is immaterial, irrelevant and incompetent.

"I have no right to instruct him. He is not my witness. I have no control over him.

[fol. 172] "Q. Do you know of the comings and goings of any other tenant in that building during the period of October 1951 through March of 1952?

"A. I'm not going to answer it. I refuse to answer that question.

"I just told you I ain't going to involve nobody else's name into anything that's not concerned in it.

"Q. Isn't the truth of the matter that you are not refusing to answer because you don't want to involve anybody else, but you just really honestly can't tell us anyone else?

"A. That ain't so. I could, but I won't do it. I refuse to tell you.

"I don't see where that—where anybody else in the building is concerned in this case.

"Q. Do you know the comings and goings of Sol Simons during any other period of time with as great particularity as you have testified here today?

"A. Just the same as I told you. The mail is all—I [fol. 173] handled his mail until the time I left, until the time I was taken sick and I retired, I left there. That was in '60.

"Q. Where was Sol Simons in November of 1953?

"A. Well, I ain't going to answer that either. I don't know just where he was. I couldn't tell you where he was.

"Q. Where was he in December of 1953?

"A. I couldn't tell you that either.

"Q. Where was he in January of 1954?

"A. There is one thing I'm going to tell you. He was in that house every month of that time I worked there. And he came—went and came back.

"Q. Where was Sol Simons during the month of January 1954?

"A. He was there—he lived there at the house. That's all I can tell you.

"Q. Where was he physically? Was he there?

"A. Sure he was there.

"Q. In January 1954?

[fol. 174] "A. I wouldn't say January. He was there in 1954. He had an apartment in the house from the time I went there until I left, and he had the same apartment.

"Q. Where was he in March of 1952?

"A. I told you. I answered that, and I don't think I'll answer it again. I answered that once.

"Q. You refuse to answer?

"A. Yes, sir. I answered it once, and I don't intend to answer it again.

"Q. You don't really know, do you?

"A. That's what you think, but I know. I know what I'm talking about. You don't—"

Do you want the comment of counsel?

The Court: Yes.

Mr. Levenson: "Mr. Gertler: This business of badgering the witness is highly improper.

"The Witness: You don't get nowhere by badgering me.

"Mr. Gertler: I object to it.

"The Witness: Because I don't go for that. I don't let nobody make a liar out of me.

[fol. 175] "Q. Where was Sol Simons during the month of January 1951?

"A. I answered that also.

"Q. No, you did not.

"A. I gave you an answer. You asked me, and I answered, and I am not going to answer it again.

"Q. We are in January 1951 now. Do you know where he was?

"A. I answered that also.

"Q. Where was he in February of 1951?

"A. I answered that also.

"Q. Where was he in March of 1951?

"A. I answered that also.

"Mr. Gertler: May I interject an objection here further and state that the answer given by the witness definitely stated that each and every month he was always at least once in the early part of the month in and on the premises. That is the answer he gave you. That is the answer he is referring to now.

"Q. Where was Sol Simons during the month of November of 1952?

[fol. 176] "A. He still lived in the house. I told you all I am going to tell you.

"Q. Do you know of his comings and goings during that month?

"A. I told you he was there always the first of the month.

"Then, after that, he went away and he never was gone over four weeks. In between four weeks—never over four weeks.

"So, that's all I'm going to—

"Q. Do you know where he was during the month of November of 1952?

"A. Just like I told you, he was there around the first of the month at all times.

"Q. But during the rest of the month you don't know?

"A. Because I got that check. And when he'd go away—I told you, he never was away never longer than four weeks at a time.

"Q. He always handed you the check?

"A. Yes.

"Q. Are you aware of the fact that his sister lives in the same building?

"A. Yes, I'm well aware of the fact.

[fol. 177] "Q. You are?

"A. Yes. I happen to know the lady.

"Q. What is her name?

"A. Let's see now. Mrs. Stream.

"Q. Stream?

"A. Yes.

"Q. How do you spell it?

"A. I don't know that exactly. I don't know the proper spelling of it.

"Q. As best you know it.

"A. Well, I don't know it that well. I don't—but I know the name is Stream, and she has a husband, and they—

"Q. What is the first letter of her name?

"A. I don't think I will answer that. I don't think I have to answer that.

"Q. You refuse to answer?

"A. I refuse to answer that, yes.

"Q. How long has she lived in the building?

'A. She's lived in the building a long time, anywheres around twelve years. She's been in the building twelve [fol. 178] years. And they live in Apartment 421.

"Q. Were they living there during 1951 and 1952?

"A. Yes, sir.

"Q. Where was Mrs. Stream, as best you remember, during October 1951?

"A. Well, I don't know their comings and goings because I didn't have much contact with them.

"I seen them come in and out, but I couldn't know the goings of them.

"Q. Where was Mrs. Stream during November of 1951?

"A. She was there in the house. She lived there in the house.

"Q. Every day of the month?

"A. I wouldn't say every day of the month. I couldn't—I'm telling you, I couldn't keep track of that part of it.

"Q. You don't know, do you?

"A. No, I don't.

"Q. Similarly, you don't know where Sol Simons was either?

"A. Not altogether, no.

[fol. 179] "Q. How about the month of December 1951, where was Mrs. Stream then?

"A. To my knowledge, she was there in the house, lived there in the house. I don't know whether—

"Q. Was she absent during any day?

"A. I don't know. I couldn't tell you that.

"Q. You don't know that?

"A. I don't know that.

"Q. Similarly, you don't know whether Sol Simons was there during that month or not?

"A. Oh, yes, I do.

"Q. You do?

"A. Yes, sir. I know that because I had contact with him.

"Q. Is there a register that the tenants and their guests sign as they come in and out?

"A. No, sir.

"Q. There is no written record whatsoever?

"A. No, sir. They have a board there with their names, and—In the office, the apartment they live in, and the same [fol. 180] way with the register coming in the door, but they don't sign.

"Q. Nobody uses the register?

"A. No.

"Q. Do you know where Mrs. Stream was during the month of January 1952?

"A. No, I couldn't tell you about any of her comings or goings. All I know is she lived in the house. I don't know nothing about her comings and goings. I couldn't tell you anything about her goings and comings. I know she lived there and she still lives there.

"Q. How about February and March of 1952?

"A. I couldn't tell you anything about that. I couldn't answer for her, whether she was away or not.

"Q. And you can't answer for Sol Simons either, can you?

"A. I answered that. I answered all I am going to answer on that. I give you all I know about that.

"Mr. Gertler: I say the questions are deliberately [fol. 181] misleading now and intend to create a trap and a snare to destroy the possibility of an honest answer.

"Mr. Levenson: All I want is the truth.

"The Witness: That's all you are going to get, because I am not going to tell no lie about anything.

"Mr. Gertler: This constant badgering doesn't accomplish anything.

"Mr. Levenson: Mr. Gertler, you know full well that this witness has not been badgered at all. I've been most courteous to him. I brought him a cup of water, and there is no such thing as badgering.

"The Witness: Anybody would bring a dog a cup of water as far as that is concerned. You haven't showed me no courtesy. I could give you a glass of water.

"What about that?

"Mr. Gertler: All right, let us continue.

"Q. Where was Sol Simons during the month of December 1952?

[fol. 182] "A. I've answered that. I am not going to answer it again.

"Q. Where was he in January of 1953?

"A. I answered that. I am not going to answer it.

"Q. Where was he in February?

"A. I am through with that. There is no need of you going any further because I am not going to tell you any more than what I told you.

"Q. Where was he in March of 1953?

"A. I told you I ain't going to answer, so that's all there is to that. I've answered it, and that's all I am going to do about it.

"Q. Where was he in November of 1953?

"A. I ain't going to answer that no more. I've answered it.

"Q. December of 1953??

"A. I'm not going to answer. I refuse.

"Q. January of 1954?

"A. I refuse to answer it.

"Q. February of 1954?

"A. I told you I wasn't going to answer any more. I've answered all the questions I'm going to answer, and that's [fol. 183] all there is—

"Q. March of 1954?

"A. I ain't going to answer.

"Q. April of 1954?

"A. I answered.

"Q. May of 1954?

"A. I've answered that. I've answered all those things. I'm not going to answer no more.

"Q. During November and December of 1954, where was he?

"A. I told you, I'm not going to answer—I've answered that question, and I am not going back to it again.

"Q. How about January, February, and March of 1955?

"A. I'm not going to answer that. I've answered all the questions I'm going to answer on that. I've given you the statement, and I don't have to give it any more. Once is enough.

"Q. How about April and May of 1955?

"A. You are wasting your time.

"Q. How about October, November and December of [fol. 184] 1955; do you know where Sol Simon was?

"A. I've answered it, and I'm not going to answer it again. I refuse to answer.

"Q. You never talked about those months. Do you know where he was?

"A. No, I don't.

"Q. Let us deal with January, February, and March, April and May of 1956; do you know his whereabouts during those months?

"A. No.

"Q. How about October, November and December of 1956; do you know his whereabouts during those months?

"A. All I know, he lived in the house and I've answered the question to the best—

"Q. Do you know his whereabouts during those months?

"A. No, I don't. I didn't know his whereabouts. He didn't tell me where he was going or when he was coming back. When he came back, he came back. That's all I know.

"Q. How about January, February, March, April and [fol. 185] May of 1957?

"A. There ain't no use going any further. I ain't going—

"Mr. Gertler: He died in 1960. He can't go much further.

"Q. Do you know his whereabouts?

"A. Where?

"Q. During the months of January, February, March, April and May of 1957?

"Mr. Gertler: Off the record.

"(Discussion off the record)

"Q. Do you know his whereabouts during those months?

"A. No. All I know is he lived in that house all that time, and he was there every month.

"Q. Was he there every day of every month?

"A. No, no, no, I didn't say that. I said he was there every month of the calendar. He was in that house, in and out of that house.

"Q. How about October, November and December of 1957?

"A. I've answered all I'm going to answer on that. I told [fol. 186] you that.

"Q. Do you know his whereabouts during those months?

"A. No, I don't know his whereabouts.

"Q. How about January, February, March, April and May of 1958; do you know Sol Simons' whereabouts during those months?

"A. I told you, he lived in the house, and I seen him every month of the year. That's all I'm going to answer. I don't know where he went or where he come from.

"All I know, he come in and out, and I carried his baggage up each time and put his car away when he came in. That's how I know so much about him, because I had to put his car away. He'd drive it in the floor and I'd take his baggage up, and I'd come down and put his car away and he paid me for it, my services.

"Q. During the first five months of 1958, can you tell us with as much particularity as you told us about the last three months of 1951 and the first three months of 1952 Sol Simons' whereabouts?

[fol. 187] "A. I've answered that, and I'm not going to answer it again. I told you all I know about it, and I'm not going to say I know where he went because I don't.

"Q. How about the last three months of 1958, October, November and December; do you know Sol Simons' whereabouts during those months?

"A. No, I don't.

"Q. How about the first five months of 1959, January, February, March, April and May?

"A. I've answered the questions to my best ability. He was there every month of the year while I worked there.

"Q. Do you know Sol Simons' whereabouts during the first five months of 1959?

"A. No.

"Q. How about the last three months of 1959, October, November and December?

"A. I told you just what I know. He was there every month of the year.

"Q. Was he there every month of the year of October, [fol. 188] November and December of 1959?

"A. Yes, sir.

"Q. Is it your testimony that Sol Simons was present on the first day of every single month from the period of April 1, 1943 to February 4, 1960?

"A. Around the first of the month always because he paid me on the first of the month. It might be a day or so he paid me ahead, but he was always there to pay me when the first of the month came.

"Q. There was never a month that he missed?

"A. No, sir, never a month he missed. And he paid me by check.

"Q. There is no answer to any question that you have given that you would like to change the answer to, is there?

"A. No.

"Q. Everything that you have told me is the absolute truth?

"A. That's right.
"Q. You are positive of that?
"A. Positive."

[fol. 189] The Court: We will recess until one-thirty.

[Whereupon, at 11:55 a.m., the hearing recessed to reconvent at 1:30 p.m.]

[fol. 190] AFTERNOON SESSION

1:30 p.m.

Mr. Ward: If Your Honor please, we would like to offer the deposition, a portion of the deposition, of Jerome Mayer, taken on the twenty-fourth day of July, 1962, in New York, New York.

This deposition, the examination, was started by Mr. Levenson, and I want to offer it myself.

Do you want to read yours first, Mr. Levenson?

Mr. Levenson: It does not matter. Why don't you read what part you want?

Mr. Ward: Starting on page 3.

Does Your Honor have that one?

The Court: Yes.

Mr. Ward: "Q. State your full name, sir.
"A. Jerome Mayer.
"Q. Where do you reside, sir?
"A. 607 West End Avenue, New York City.
"Q. What is your occupation, profession or employment, sir?
"A. Well, I am mostly today a management consultant.
"Q. Have you always been in that line of endeavor?
[fol. 191] A. I am and was a lawyer.
"Q. How long were you a lawyer?
"A. I am still a lawyer.
"Q. When were you admitted to practice and where?
"A. 1934, New York State."

I am going to skip a little, as I do not consider it particularly important.

We will go to page 5.

"Q. Mr. Mayer, in your professional experience did you have occasion to represent a lady called Lucy C. Simons?

"A. Yes.

"Q. Are you familiar with the fact that she is now suing the First National Bank of Miami Beach, Florida, the Executors of the last will and testament of Sol Simons?

"A. I only know it by hearsay, what you just told me.

"Q. You didn't know it before?

"A. And her statement on the telephone.

"Q. You spoke to Mrs. Simons on the telephone recently?

"A. Yes.

[fol. 192] "Q. When was that?

"A. A few weeks ago.

"She said I might be subpoened.

"Q. Do you represent this lady any more?

"A. No.

"Q. When did you stop representing her?

"A. I guess with the entry of the final order in the Simons against Simons case.

"Q. What exactly was your representation of this lady in that matter?

"A. I have actually no present recollection whatsoever. As far as it goes, it was simply to help her increase the amount of alimony she was being paid under some sort of an agreement or other arrangement having to do with separation or otherwise.

"Q. Did you bring your office file with you today?

"A. I have a file with me. There is virtually nothing in it.

"Q. Have you reviewed it before you began testifying?

[fol. 193] "A. Yes.

"Q. Do you keep regular files in the course of your practice?

"A. Well, this is again a relative term.

"Yes, I keep files and when I get finished with a matter I either clean it out or something. I don't even know why I still have this file. There is virtually nothing in it."

I will skip several pages here to the top of page 7.

"Q. When did Lucy C. Simons first come to you in regard to this increase of support?"

Mr. Levenson: Where is that?

Mr Ward: The top of page 7.

"Q. When did Lucy C. Simons first come to you in regard to this increase of support?

"A. I have no recollection at all. The only thing that I have in here in my file is that I served a subpoena on Sol Simons—the subpoena is dated November 15, 1951. So that it was some time around that time.

"Q. Do you have a return on that subpoena?

[fol. 194] "A. I don't know what this is. There is a mark on the back of the subpoena which says to Sol Simons, 69-10 Yellowstone Boulevard, Forest Hills 1/29. What that significance is, I have no idea

"Q. Well, 1/29, you know, represents the final hearing date, do you not?

"A. I don't know anything. I'm only telling you what I see here.

"Q. Do you remember when the final hearing occurred?

"A. I have no recollection.

"Q. You don't know then when Sol Simons was served, if at all?

"A. No.

"Q. Now, how long did you represent Mrs Simons?

"A. I don't know. The only thing I would have to do is assume what Mr. Green testified to this morning is true, and that probably delineates the time.

"Q. You heard Mr. Green testify?

"A. Yes.

[fol. 195] "Q. You don't dispute his testimony in any respect?

"A I can't dispute it, I have no recollection on it.

"Q. Do you remember Mrs. Simons coming to you and discussing a Florida divorce proceeding?"

Then there were some objections here.

"A. The answer is I don't remember."

I will skip this. There was a claim of privileged communication.

Then on page 10 if Your Honor please. We will start there.

"By Mr. Levenson:

"Q. Do you recollect having any conversations with Mrs. Lucy C. Simons in regard to a Florida divorce proceeding?

"A. No.

"Q. You have had none that you recollect?

"A. That's right.

"Q. Did you discuss the Florida divorce proceeding with Mr. Green?

"A. I have no recollection of it.

"Q. You don't dispute his testimony?

[fol. 196] "A. I don't dispute it. I have no recollection on it.

"Q. Now, let us see if we can get this much at least accurately stated:

"Isn't it a fact that you did represent Mrs. Lucy C. Simons from some time in the latter part of 1951 to some time in the early spring of 1952?

"A. I have already stated that to be the fact.

"Q. Did she have any other lawyers in New York at that time?

"A. I don't know.

"Q. She never mentioned it to you?

"A. I didn't say that. I said I don't know."

Then on page 11 at line 9.

"Q. Didn't you in fact contemplate appearing in the Florida divorce proceeding for Lucy C. Simons, in the beginning of April of 1952?"

Then the question was asked after colloquy of counsel on line 19:

"Q. What action did you contemplate taking in the early [fol. 197] part of April 1952 on behalf of Mrs. Simons in the Florida divorce proceedings?"

There was an answer on page 12 on line 12.

"A. The fact is, I don't remember anything about it."

I am sorry. That answer begins at line 8.

"A. If I did contemplate anything. I don't recall what it was. I don't recall whether the action was ever discussed with me or not, and if it were discussed with me, then I would say it is a privileged communication.

"The fact is, I don't remember anything about it.

"Q. Will you check your file and see if it refreshes your recollection about what action, if any, you took?

"A. There is nothing in my file indicating anything of that sort.

"Q. In checking your file, does that file reflect anything in regard to your telephone conversations with Mr. Green?

"A. No.

"I usually have an excellent memory, and I remember [fol. 198] these things when they are current. And then they seem to erase, I don't remember.

"Q. Do you keep a day book?

"A. I used to, yes. I kept one, yes, but where it is God knows—eleven years ago.

"Q. Have you searched for your day book for 1952?

"A. I haven't got it. I have moved since. There is no point in keeping it.

"Q. Do you have any independent recollection whatsoever of this Florida divorce proceeding that we have mentioned?

"A. I don't know anything about the Florida divorce proceeding."

That is all we want to proffer or rather offer into evidence. Maybe Mr. Levenson has something else.

Mr. Sibley: We have nothing.

Mr. Levenson: Nothing else.

Mr. Ward: We would like to now offer certain excerpts from the deposition of Myron J. Green, taken on July 24, 1962, the same date, I think and the same time as the prior deposition.

We can probably shorten that, Your Honor.

[fol. 199] Starting at the top of page 4.

"Q. In your professional experience, did you have occasion to represent the late Sol Simons, whose executor is the defendant in this case?

"A. Yes, I represented Sol Simons.

"Q. Did you represent him in marital litigation with the plaintiff in this case, Lucy C. Simons?

"A. Yes.

"Q. What was the nature of that litigation?

"A. His wife at that time, Lucy C. Simons, sued him for separation in the Supreme Court of New York County.

"Q. What year was that, sir?

"A. The action was started in 1946.

"Q. Calling your attention to 1951, did Lucy C. Simons in that action institute any sort of proceedings?

"A. Yes. She made an application—the answer is yes.

"Q. What sort of proceeding did she institute and when? [fol. 200] "A. She made an application to increase the amount of alimony which she was receiving under the judgment and decree in the separation action which was entered in 1947.

"Q. When did she file that application for increase?

"A. Well, it was done by order to show caused dated September 24, 1951, and we were served with it—that is, Mr. Simons was served with it some time shortly thereafter. I know it was made returnable on October 11, 1951.

"Q. But actually the hearing in the matter did not take place on that return date, did it?

"A. Well, on the return date there was what you call a hearing in Special Term, and the matter was referred to an official referee to take proof.

"Q. Was that man's name David L. Weil?

"A. That's right.

"Q. Now, during that period of time, namely, September and October of 1951, did your client, Sol Simons, advise [fol. 201] you he was leaving the State of New York to take up residence elsewhere?

"A. He was advising me he was leaving the State of New York, and he wrote and corresponded with me from Florida, but I couldn't tell you exactly when. I have no notations to tell me just when that occurred, because all my records deal only with litigation.

"Q. But that change of residence did occur during the pendency of proceedings for an increase, is that correct?

"Mr. Gertler: The answer was given. I object to the question as being superfluous. The answer was given.

"A. I can help you to this extent."

Then the objection was made. We will go over to page 6, on line 8.

"A. On November 19, 1951, I wrote to Mr. Sol Simons at Miami Beach, Florida, which satisfies me that he had gone there some time before November 19, 1951."

Then the objections were made.

[fol. 202] Then he pointed out, line 19, page 6, Your Honor: "I have three copies, one November 19, 1951, one November 26, 1951, one November 27, 1951"—

Mr. Levenson: There is a question just before that on line 17 which clarifies it.

Mr. Ward: All right. We will just correct that. We will go back.

On line 17:

"Q. You refer to a copy of a letter in you file. Is that correct?

"A. I have three copies, one November 19, 1951, one November 26, 1951, one November 27, 1951, all addressed to Mr. Sol Simons at Miami Beach, Florida, and as I recall now, he would call me and I had to call him back always at Miami Beach around that time."

Mr. Levenson: If Your Honor please, the letters that he has referred to were marked for identification by the court reporter.

Mr. Ward: I know. I have no objection to putting them in or leaving them out. I am trying to shorten the record.

Mr. Levenson: I would like to put them in. These are the three letters to which he referred.

[fol. 203] Mr. Rosenberg: May we see them?

Mr. Levenson: You have copies of them.

The originals were retained by agreement in this deposition. Copies were furnished to you.

Mr. Ward: We have no objection here, Your Honor, to that.

The Court: It seems to me the procedure would require the plaintiff to go ahead with his testimony, offer his evidence; then the defendant offer his evidence.

Mr. Ward: I would think so.

Your Honor, I am going to skip page 8, because those are the same transcripts that were identified by the exemplified copies.

Mr. Levenson: That is not right. The transcripts he identified were the transcripts of the hearing itself. Those are papers from the proceeding.

Mr. Ward: I will be glad to offer this.

"Q. Now, when did you have a hearing in that proceeding—"

The Court: From where are you reading?

Mr. Ward: On page 8, line 5, Your Honor.

"Q. Now, when did you have a hearing in that proceeding for an increase?

"A. On January 29, 1952.

[fol. 204] "Mr. Levenson: Will you mark this Defendant's Exhibit A-4 for identification.

"It is a transcript of a hearing."

The transcript of the hearing was marked Defendant's Exhibit A-4 for identification as of that date.

"Q. If I show you a transcript of the proceedings conducted on January 29, 1952 on the application for an increase, would you recognize it, sir?

"A. I believe I would.

"Q. I show you what has been marked as Defendant's Exhibit A-4 for identification and ask you if that is a true and correct transcript of that hearing conducted on January 29, 1952.

"A. Yes."

I would like to offer this in evidence. I believe it was part of the exemplification. It is a duplicate.

We would like to have it marked as an exhibit by the plaintiff.

The Court: Any objection?

Mr. Sibley: On the same grounds as I objected to the former record in the case, as being immaterial and irrelevant.

[fol. 205] The Court: It will be marked as Plaintiff's Exhibit No. 4.

[The document referred to was thereupon marked "Plaintiff's Exhibit No. 4."]

Mr. Sibley: May we get the procedure straight? He is offering the depositions. As I understand it, he is offering just a question here and a question there, or is he offering the entire deposition?

Mr. Ward: I am offering everything that I consider pertinent. I am trying to cut out the irrelevant matters.

Mr. Sibley: As long as you are proffering, why not proffer what you have, and we will not object to it being irrelvant.

It seems to me, Your Honor, if he is going to put in the examination of this witness, he ought to put it all in.

The Court: I think you can use part or all of the deposition, whatever the person wants to offer.

Mr. Ward: This is a deposition, Your Honor, that Mr. Levenson took.

Mr. Sibley: It is not of the parties.

Mr. Ward: No, but of the witnesses.

Mr. Sibley: Go ahead.

[fol. 206] Mr. Ward: I was trying to cut it down.

Is there anything pending on which Your Honor should rule?

The Court: No.

Mr. Ward: This is line 21 of page 8.

"A. Yes.

"Q. Now, when was a final ruling made on that application for an increase?

"A. Well, Referee Weil submitted a report which went to Justice Aurelio, and then Justice Aurelio didn't fully agree with the conclusions of Referee Weil, and they handed down a decision which appeared in the New York Law Journal. I think I have the decision.

"Yes, that appeared in the New York Law Journal on March 7, 1952.

"Q. When was the order actually signed?

"A. An order was signed on March 31, 1952.

"Q. Now, during the course of the pendency of this litigation in New York, did you become aware of the fact that a Florida divorce proceeding had been instituted by Sol [fol. 207] Simons against Lucy C. Simons?

"A. Yes.

"Q. How did you become aware of that fact, sir?

"A. Mr. Simons told me about it.

"Q. Did you during that period of time have any conversation with Lucy C. Simons or her legal representative in regard to the Florida divorce action?

"A. I don't believe I ever spoke to Lucy C. Simons about it. I did speak to Mr. Mayer about it on the telephone on several occasions, and I wrote Mr. Simons about it and he wrote me back about it.

"Q. Can you remember when you spoke to Mr. Mayer, how many times?

"A. Oh, it was between March 25 and April 3, 1952, and I would say it appeared at least twice.

"Q. You had at least two conversations as—

"A. Oh, I had more than two conversations. I know it was at least two.

"Q. On the telephone?

[fol. 208] "A. Yes.

"Q. Would you tell us as best you recollect what those conversations were?

"A. Well, he was entering an order for the arrears of alimony, the arrears of the increase, and also for his counsel fee which I see was fixed at $150.

"The question was what he would have to do to collect it, and also during the course of those conversations he told me that Mrs. Simons expected to appear to contest the divorce action in Florida, and I so advised Mr. Simons in writing.

"Q. Can you tell us when you wrote to Mr. Simons advising him of your conversation with Mr. Mayer?

"A. I wrote him on April 31, 1952."

Mr. Levenson: That is a mistake there. He said April 3. That is just a typographical error.

Mr. Sibley: Do you have the letter?

Mr. Levenson: Yes. We have the letter.

The Court: He has the deposition here.

Mr. Ward: I wrote him o . April blank, 1952.

"Q. Let me go back one minute.

"The Mr. Mayer that you refer to is Jerome Mayer?

[fol. 209] "A. That's right.

"Q. And he was the attorney in the proceeding for the increase filed by Lucy C. Simons?

"A. Yes.

"Q. He was her attorney?

"A. That's right.

"Mr. Levenson: Will you mark this letter dated April 3, 1952 as Defendant's Exhibit A-5 for identification."

That was marked for identification, and we will offer that letter.

Mr. Sibley: You will offer it?

Mr. Ward: Yes.

The Court: That will be Plaintiff's Exhibit No. 5.

[The document referred to was thereupon marked "Plaintiff's Exhibit No. 5."]

Mr. Ward: On page 11, starting at line 18:

"Q. In response to that letter to Sol Simons, did you receive a reply?

"A. Yes.

"Q. Do you have the original letter of reply from Sol [fol. 210] Simons?

"A. Yes.

"Q. May I see that, sir?

"A. Yes.

"Mr. Levenson: Will you mark this letter that has been identified as Sol Simons' reply as Defendant's Exhibit A-6 for identification."

Mr. Sibley: Do you offer that?

Mr. Ward: We will offer the letter.

[Informal discussion off the record]

Mr. Ward: An undated letter of Sol Simons, which has been identified as a letter in answer to Mr. Greene's letter of April 3.

The Court: Do you have any objection?

Mr. Sibley: No objection.

The Court: It will be marked Plaintiff's Exhibit No. 6 for identification.

[The document referred to was thereupon marked "Plaintiff's Exhibit No. 6."]

Mr. Ward: Continuing, Your Honor, on page 12.

"Q. After your letter of April 3, did you have any other conversations at all with Mr. Mayer in regard to this Florida divorce?

"A. I don't recall any. I sent a letter to Mr. Mayer en-
[fol. 211] closing three checks under the date of April 14, 1952.

"Q. Did you know that Lucy C. Simons actually failed to appear in the Florida divorce proceeding?

"A. I wrote Mr. Simons on April 14, telling him I was interested to know whether the other side had appeared and also the status of the matter.

"And he called me some time later. He had a great habit of telephoning at all hours of the night and on Sunday mornings, to wake me.

"Q. And did you then become aware of the fact that she failed to appear?

"A. He told me that at one time on a phone conversation.

"Q. Did Mr. Mayer ever advise you of why Lucy C. Simons failed to appear?

"A. I don't recall ever talking to Mr. Mayer after I sent him the checks of April 14, 1952."

Continuing on page 13, line 10.

"Q. Were the parties to this litigation that you partici-
[fol. 212] pated in New York on friendly terms?"

An objection was made.

"A. Oh, no, anything but.

"Mr. Gertler: He doesn't know.

"A. I would say this, that Mr. Simons told me after he wrote me his letter in answer to mine of April 3, 1952, that he is very anxious for her to appear there in Florida, because he had ideas of laying the foundation for perjury and holding her for perjury in Florida—"

An objection was made.

Page 14:

"Q. Will you continue telling us what Mr. Simons told you, sir?

"A. That was in substance as he wrote me in his letter.

"He was anxious for her to come down. He thought this would be his chance to show her up as a perjurer, as he termed it. And in Florida he would try to have her held for perjury, and he was very anxious for her to come down.
[fol. 213] "Q. During the pendency—
"A. That is what he told me on the phone.
"Q. During the pendency of this litigation in New York, other than this conversation about the Florida divorce, did Mr. Simons ever express his feelings about Lucy C. Simons to you?
"A. Yes.
"Q. Tell us in substance what he said, sir."

Then they got off on an objection on the Dead Man's Statute.

We go to the top of page 15, line 8.

"A. He was always bitter towards her. He felt that her testimony at the trial and that of her sister was perjured; that she always brought in her sister to say what was required.
"Q. Which sister is that?
"A. The sister of Mrs. Simons.
"Q. Would that be Helen Forman?
"A. I think that's the one. There was only one sister who testified at the trial.
[fol. 214] "And he said that she was always conveniently around any corner she wanted to place her whenever anything was to be said, and he felt that all her testimony was false and, as he termed it, perjurous, and he was only hoping for the time he could get her in a place he could prove it.
"That was the substance, and as you noted, I think that is what he wrote me in answer to my letter of April 3, 1952."

Going to page 16, line 5:

"Q. Well, now during the month of March, this application for an increase was still pending in New York?
"A. March 1952?
"Q. Yes.
"A. Yes. It wasn't determined until April 1952."

"Q. During the month of March, let us say from the 10th of March on, were you aware of the whereabouts of Sol Simons?"

An objection was made.

"A. It was still pending into April 14, 1952."

[fol. 215] That is line 20.

"So I knew in March 1952 that he was in Miami, because I wrote him at Miami on February 11, 1952, and again on April 3, 1952."

Mr. Levenson: Finish it.

The Court: "And I had his home address."

Mr. Ward: Yes. That is all right.

"And I had his home address."

No other questions. That is all of that one.

I think there is only one possible short one left, and I may not use that one.

I will make this short, Your Honor.

I want to offer the deposition of Sadie Miner, certain portions thereof, taken July 24. She was the housekeeper.

One page 4, line 4:

"Q. For what period of time were you so employed?

"A. 14 years I worked there.

"Q. From when to when?

"A. From '46, the latter part of '46 in the spring, until 1960, when he was taken sick.

[fol. 216] "Q. What hours did you keep?

"A. Well, from eleven to four, four to five. Sometimes if I wasn't done I worked a little later, and somethimes I would get in a little early if the train came in and I went right there about half past ten."

Skipping down—

Mr. Levenson: It is in the middle of an answer.

The Court: That does not make any difference.

"You know, never any earlier. From half past ten, eleven, until about half past four, five o'clock, sometimes."

Mr. Ward: I do not think that is necessary.

The Court: It makes no difference.

Mr. Ward: If you want to read it all, it is all right with me.

"Q. What days of the week did you work?

"A. From Monday to Friday.

"Q. So that you worked on Fridays as well?

"A. Yes.

"Q. You worked Monday, Tuesday, Wednesday, Thurs-
[fol. 217] day and Friday?

"A. Yes. Every day."

We will go to the top of page 5.

"Q. And that was at the apartment at 69-10 Yellowstone Boulevard?

"A. Yes.

"Q. Was that Apartment No. 401?

"A. 401.

"Q. And you were in that apartment during those hours continuously?

"A. Yes, continuously.

"Q. Now, what were your duties?

"A. Well, I cleaned the house and I cooked for him, you know, for lunch. Not for supper.

"Q. I understand.

"A. I cooked for lunch at twelve o'clock.

"Q. Did you answer the telephone?

"A. Well, once in a while I answered the telephone, if he wasn't there.

"Q. Did you ever miss any days of work during that 14-year period of employment?

"A. No, I don't think I ever did. I have terrible colds like I have now, but I never stayed home.

[fol. 218] "Q. Well, you had a broken ankle once?

"A. Well, that was in 1960. On the 7th of March. He was away and we called him up, Miss Ross, the lady next door to me called him up and told him that I had fell. He was away. That I had fell.

"Q. Where was he?

"A. That was the 7th of March.

"Q. 1960?

"A. 1960.
"Q. And he was in Florida at that time?
"A. Yes, sir, he was in Florida.
"Q. How old a lady are you?
"A. I was 79 April 14."

Going to line 14:

"Q. All right, other than for that period of time, were you continuously at the premises at 69-10 Yellowstone Boulevard each and every day during the hours mentioned, for the 14 years you were associated with Sol Simons?
"A. Yes, all but when I broke my ankle.
"Q. Now, did you ever during that period of time see [fol. 219] Lucy C. Simons?
"A. Never. I swear. I never seen her.
"Q. When did you first see her?
"A. At the funeral services, when I asked where was Mrs. Simons, Mrs. Lucy C. Simons, and a lady pointed her out to me."

Page 7:

"Q. And that was October—
"A. And she had a white hat on.
"Q. Was that October 29, 1960?
"A. Yes.
"Q. That is the first and only time you had ever seen her?
"A. Yes, I never seen her. That was the first time.
"Q. Starting from March 10, 1952, through the entire months of March and April was Mr. Simons at 69-10 Yellowstone Boulevard?
"A. He was in the hospital."

I will skip that and go to page 7 at line 20.

"Q. Calling your attention to the period of time from [fol. 220] March 10, 1952 through the entire month of March of 1952, and the month of April 1952, was Mr. Sol Simons at the apartment at Yellowstone Boulevard?
"A. No.
"Q. Where was he?
"A. He was in Florida.
"Q. Was he there at any time during the period?
"A. No. Not as I know.

"Q. When I say 'there,' I mean was he there in the apartment at Yellowstone Boulevard during that period of time?

"A. No.

"Q. Now, did you during that particular period of time, March 10 1952 through April 1952, see Lucy C. Simons at the apartment?

"A. Never, never.

"Q. Did she ever come to the apartment?

"A. Never, never.

"Q. Did Mr. Simons ever give you any instructions in regard to telephone calls from Lucy C. Simons?

"A. Yes. He said if she called up to hang up.

[fol. 221] "Well, I couldn't swear that it was her, it was a woman's voice twice, and I hung right up.

"Q. When was that?

"A. That was in—let me see—that was around '53. What day, I couldn't remember."

We will skip a few items here, and we will go to page 10, the bottom of page 10.

"Q. You were Mr. Simons' housekeeper at 69-10 Yellowstone Boulevard, Forest Hills, is that right?

"A That's right.

"Q. And when did you first come upon the premises in that capacity as a housekeeper?

"A. Yes.

"Q. When for the first time did you come upon those premises?

"A. 1946.

"Q. So you were his housekeeper in 1951?

"A. Yes.

"Q. And you were his housekeeper in October, November and December of 1951?

"A. Yes.

"Q. And you were paid—how were you paid, weekly, monthly or what?

[fol. 222] "A. I was paid weekly.

"Q. By him?

"A. Yes.

"Q. And you were paid by him in October, November and December of 1951?

"A. Yes.

"Q. So he was present in the premises in October—

"A. He always left five or six weeks' money—

"Q. Wait a minute—

"The Court: I don't think it was responsive. Go ahead.

"Q. When you were his housekeeper October, November and December of 1951—

"A. Yes.

"Q. —and Simons had an apartment at the premises 114—no, Simons had an apartment at 69-10 Yellowstone Boulevard, Forest Hills, is that right?

"A. Yes.

"Q. Apartment 401?

"A. Yes.

"Q. And in October, November and December of 1951, [fol. 223] he had that apartment?

"A. Yes.

"Q. And you were his housekeeper?

"A. Yes.

"Q. And you were paid weekly or monthly? How were you paid?

"A. I was paid by the week.

"Q. And he was present in 1951—

"A. No, no he wasn't always present. Don't say that.

"Q. But he was present some time in October, November and December 1951, is that correct?

"A. That I couldn't remember.

"Q. But you could remember—withdraw the question.

"A. Listen—

"Q. One moment. Just answer my question.

Mr. Levenson: Take it easy with this lady, she is 80 years old.

"Q. You say you were paid weekly?

"A. Yes.

"Q. In October, November and December of 1951, were you paid weekly?

"A. Yes.

[fol. 224] "Q. By Mr. Simons?

"A. No.

"Q. How were you paid?

"A. He left the money there sometimes for six weeks at a time. I would go up and I would take it out myself.

"Q. Did he leave it seven weeks at a time?

"A. Yes.

"Q. Did he leave it eight weeks at a time?

"A. No, I don't say he left it eight weeks at a time. Every week I took my own money.

"Q. The most he ever left the money personally instead of paying himself was seven weeks, is that right, in October, November, December 1951?

"A. Yes. Sometimes more, sometimes less.

"Q. When you say 'sometimes more' what do you mean?

"A. Well, sometimes eight weeks, sometimes longer than that.

[fol. 225] "Q. What is the longest period of time that he left you money?

"A. What do you mean?

"Q. How much did you get a week?

"A. I get $23 a week and $3 carfare.

"Q. So it is $26 a week, is that right?

"A. $25 a week.

"Q. When he left you five weeks', he left you $125, is that right?

"A. Yes.

"Q. What is the maximum in dollars and cents he ever left you, how much, the most?

"A. What do you mean, envelopes?

"Q. In salaries, envelopes, yes.

"A. That I would have to figure up.

"Q. Well, figure it up.

"Did he leave you seven weeks' salary at any time?

"A. Yes.

"Q. Did he leave you eight weeks' salary?

"A. At times he would.

"Q. Did he leave you nine weeks' salary at any time?

[fol. 226] "A. Not as much as that.

"Q. So the maximum he left you was eight weeks' salary?

"A. Yes.

"Q. And he left you eight weeks' salary in 1951, the latter part of the year?

"A. Yes.

"Q. Now, in 1952, he left you eight weeks' salary, which is the most he ever left you, is that right?

"A. Yes.

"Q. And then he paid the salary himself, is that right?

"A. Not always.

"Q. Well, who paid it?

"A. I took it out of the drawer."

Then skip on down to page 15, line 18.

"Q. Besides the eight weeks' salary, you used to take money out of the drawer also? He paid you eight weeks' salary, would you say he—

"A. At a time. I'm not saying one right after another. At a time.

[fol. 227] "Q. Let us take January, February, March and April of 1952.

"A. Yes.

"Q. What maximum salaries did he leave you in envelopes? How much?

"A. That I don't remember, just how much."

I think the rest is repetitious. I think that is all.

I want to call Mrs. Simons now.

Thereupon: LUCY C. SIMONS was called as a witness in her own behalf and, after having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Ward:

Q. Mrs. Simons, are you the plaintiff in this case?

A. I am.

Q. Just by way of a short background, Mrs. Simons, the exhibit from the first 1946 proceeding in New York show

that there was a decree of separate maintenance entered in 1946.

Now, where had you lived prior to the entry of this [fol. 228] decree?

A. 69-10 Yellowstone Boulevard, Forest Hills.

Q. That is the residence that has been under discussion here today?

A. That's right.

Q. In the depositions?

A. Yes.

Q. Where did you move or where did you reside after that separation?

A. Well, I resided at several hotels. I stayed with my sisters first. Then I resided at several hotels.

Q. During that period of time, from 1946 up to the fall of 1951, did you have occasion to see Mr. Simons at odd times?

A. Yes.

Q. Where did he reside?

A. The same premises, 69-10 Yellowstone Boulevard.

Q. What was your occasion for seeing him?

A. Well, he would call me once in a while and say—he had no stenographer, would I do some work for him in a hurry.

Q. Just explain that as short as you can, as quickly as you can, to the Court.

Why did he need a stenographer in New York City?

[fol. 229] A. Well, he had no office. That was his office and his home.

Q. Had that been his office and home during your married life?

A. Yes.

Q. Do you recall when you first moved into that 69-10 Yellowstone location?

A. Yes.

Q. When was that?

A. Right after we were married. We moved in in 1941.

Q. Had he rented that apartment before your marriage, or did you jointly?

A. No. He rented it for our marriage.

Q. Then he had not lived there as a single man?

A. No.

Q. You and your husband then had that as your home?

A. That's right.

Q. You lived there some five or six years?

A. That's right.

Q. During that time, do I understand he carried on his business?

A. Yes, sir.

[fol. 230] Q. His business arrangements there?

A. Yes.

Q. How many telephones did he have?

A. Well, when I left there, there was just one phone in the bedroom at that time.

Q. Without going into a lot of detail, what kind of business was he engaged in?

A. He would buy frozen foods. He would buy the entire crop of the farmers, for which he had orders in advance, and he would put them in the storage warehouses until the purchasers wanted to take them out.

Q. During the course of your married life, from 1941 to 1946, what was his itinerary or his method of doing business?

A. Well, first, I would take books about that big [indicating] to get him started and would write to every grower and every farmer throughout the entire country until he found a footing. Then it would be by telephone or by car or letter.

Q. Letter, telephone or car. Did he ever use airplanes to fly?

A. Not at that time.

Q. Not at that time. It was during the war.

After 1946, when you and your husband were separated, do you know how he carried on his business and from what point?

[fol. 231] A. Well, I found out when I was there he had about four or five telephones there, and he was in the phone book as still being at 69-10 Yellowstone Boulevard.

Q. Was he in the phone book up there at all times?

A. All the time.

Q. Since 1946 up to the time he died?

A. A year after—a few months after he died.

Q. Was there any time during that period of time from 1946 to 1960 that he did not carry a telephone listing?

A. No. Always in the telephone book.

Q. Do you know about his automobile or automobiles?

A. Well, I know he had a Buick, and the license was always SS 91.

Q. Every year?

A. Every year it was the same number.

Q. Before you were married or after you were married?

A. Always the same number.

Q. And after you were separated?

A. Always the same number.

Q. Did you have any idea of Mr. Simons' travel requirements in his business?

[fol. 232] A. Yes. He would go down south. He had to visit a lot of growers and warehouses and farmers through Georgia and Carolina, Florida, Mississippi, Tennessee.

Then he would call upper New York State, and when he came to California, places like that, he would telephone or write.

Q. Do you recall particularly when he was covering the Florida markets? Was that in the spring of the year?

A. Yes.

Mr. Sibley: Do not lead.

Would you mind instructing counsel not to lead the witness?

The Court: Do not lead the witness.

Q. Do you recall any particular time of year when he would go into various areas by virtue of his business requirements?

A. He would go to the farmers before the crops were harvested and place an order for the entire crop to be put into the storage warehouse.

So, it would always be before harvest time.

Q. That was handled, was it not, out of the New York apartment?

A. Yes, everything from my dinette in the kitchen.

[fol. 233] Q. Can you remember how many times after the second court hearing in New York—that was around

January or February, 1952—that you had occasion to see your husband in New York?

A. Well, I got notice that he had advertised in a Jewish newspaper in Miami that he was suing me for divorce, and I was so startled. I called my sister, and I went to her home, and I spoke to him on the phone, and he said that he was angry at the time, and he said, "Forget about it, because I shall never forget you started my business, and I always told you I would never forget what you have done for me."

I suggested I come over and talk to him about it, because he said, "As far as I am concerned, you can destroy that. I certainly will never go through with it."

He said, "I told you once," he said, "and, in fact, several times, I will never give you a divorce, and I will never get a divorce."

Q. Did you go to talk to your husband?

A. Yes, I did.

Q. Do you recall approximately the date?

A. Well, it was a day or two after I got the notice. I don't remember the exact date.

It was in the early spring. I know that, because I didn't wear a winter coat.

[fol. 234] Q. Where did you go to see your husband?

A. At his apartment, 69-10 Yellowstone Boulevard.

Q. Did anybody go with you?

A. My sister went with me.

Q. What was the conversation which took place there?

A. Nothing very startling. We came in, and he greeted us, and we greeted him, and we sat down.

I said, "What is this paper?"

He said, "Forget about it. It was in a fit of temper. Just destroy it."

I said, "Then I should not do anything about it?"

He said, "Pay no attention to it. I'm not going through with the divorce," and he repeated it again that he once said he would never give me a divorce and would never get a divorce.

Q. Mrs. Simons, I hand you an instrument which is a part of Exhibit No. 2.

Mr. Ward: Let me show Your Honor that these did not fall apart. That was the order April 1, 1952. It was a part of this exhibit.

I will ask you to examine this copy of an order of the New York court dated the 1st of April, 1952.

[fol. 235] A. Yes.

Q. Are you familiar with that order?

A. Well, I didn't see it, but I know the case.

Q. Did you know about the entry of the order when it came out?

A. About my increase, you mean?

Q. Yes.

A. Yes.

Q. Can you relate the date of that order in any way to the conversation that you had with your husband?

A. Well, I think that is what got him so angry, because he said to me, "Why didn't you come directly to me for an increase?"

I said, "Well, I like everything to be done legally. I think it's the safest way, and it's the best way."

Q. Mrs. Simons, you had counsel, according to the deposition of Mr. Mayer and parties, who represented you through, I guess, October, September, on through April 1.

Did you ever hire anyone to represent you in any Florida divorce proceeding?

A. No.

Q. Can you tell the Court why?

Mr. Sibley: I think that is immaterial, Your Honor. I object to it.

The Court: Objection overruled.

[fol. 236] Q. You may answer.

A. Well, I didn't think there was any necessity. I know nothing about the law, and when Mr. Simons said, "I'm not going through with this divorce," I had continued getting my alimony until the date of his death.

I figured if he had gotten the divorce, I certainly wouldn't be getting any alimony.

So, I saw no necessity of doing anything about it. I took it for granted that he meant what he said.

Q. When this order of the 1st of April of 1952 was entered, did you start getting those advanced payments or increased payments from Mr. Simons?

A. You mean this order [indicating]?

Q. Yes.

A. Yes.

Q. Was there any notification by him at any time that he was not going to make those payments?

A. No.

Q. Do you know where Mr. Simons lived during this period of time from 1952 on up to the time he died?

A. He lived at 69-10 Yellowstone Boulevard in Forest Hills.

Q. Do you know where he was living when he died?

A. He was living at 69-10 Yellowstone Boulevard.

He died in the hospital up there in Queens County.

[fol. 237] Q. Do you know how long he had been up there?

A. You mean at that apartment?

Q. Yes.

A. Since 1941.

Q. When was the first time that you heard about his death?

A. I think a day or two before his funeral.

Q. Did anyone tell you that he, at that time, or anyone on his behalf tell you that he claimed to be a resident of Florida?

A. No.

Q. Did you go to the funeral?

A. Yes, I did.

Q. What was the next step that you understood after the funeral?

A. Then after that, I spoke to a cousin of mine who is an attorney, Frank Levien, and I asked if I could come down and speak to him, or if he would talk to me or to Mr. Steinbrink, because they are not very active, and I explained the circumstances, and I said that my husband had died now, and I am not divorced.

I said, "Where do I stand?

I said, "Is my alimony to be continued or not?"

[fol. 238] Then he took it from there.

Q. When did you for the first time know or were advised that some kind of a divorce decree had been entered?

A. He discovered it himself.

Q. That is your attorney after your husband's death?

A. Yes.

Q. When did you find for the first time that he claimed that he was a resident of Florida as of the date of his death?

A. When they discovered that he had gotten that divorce.

Q. Mrs. Simons, from 1946, when your husband and you were separated under this decree, how did you designate yourself from that time on?

A. Well, I will tell you, I had been asked so many embarrassing—

The Court: Just answer the question, please, ma'am.

How did you designate yourself?

The Witness: Mostly divorced to people I had never met before.

Q. That started in 1946?

A. From that time on, except to my friends.

Q. In your employment or social security and things of [fol. 239] that nature, how did you designate yourself?

A. Only divorced.

Q. You did work before your marriage in 1941?

A. Oh, yes.

Q. And you continued to work for your husband from 1941 to 1946?

A. That's right, and I worked during the day besides.

Q. You worked for your husband even after the separation?

A. Right.

Q. A lot of times?

A. Yes.

Q. Did you have any other employment?

A. No.

Q. At those places did you always designate yourself as Mrs. Lucy Simons?

A. Yes, Mrs. Lucy Simons.

Mr. Ward: Those are all the questions I have.
The Court: Cross examination.

Cross examination.

By Mr. Sibley:

Q. Mrs. Simons, where did you reside during the year 1952?

A. I resided at the Beacon Hotel on Broadway and [fol. 240] 75th Street, Manhattan.

Q. New York City?

A. Yes.

Q. How long had you resided at that hotel?

A. Three years.

Q. Prior to residing at the Beacon Hotel, in what hotel did you reside?

A. Well, I resided at the Alcott Hotel.

Q. How long did you reside at the Alcott Hotel?

A. About a year or a year and a half.

Q. Where is that located?

A. West 72nd Street, Manhattan, Broadway.

Q. Prior to that, where did you reside?

A. I was at the Cameron Hotel, West 86th Street in Manhattan for about a year or so.

Q. What was the first hotel to which you moved after the separation proceedings were started by you against your husband?

A. Well, I stayed with my sister a while until I had some money, a little bit of money. Then I moved to the Standish Hall Hotel, West 81st Street, Manhattan, a one-room apartment in each place.

Q. Then it is fair to say that shortly after the commencement of your separations proceedings against your husband, you resided continuously at one or another hotel in [fol. 241] New York City?

A. Yes.

Q. During the period of time that you resided with Mr. Simons, I believe you testified he was in the frozen vegetable and fruit business?

A. Yes.

Q. He would buy a crop from a farmer and would put it in freezers and sell it out to the processors later on or to the public?

A. That's right.

Q. By 1946, he was doing a fairly good business, was he not?

A. Yes.

Q. All of his business was being transacted from his office, which was his apartment?

A. That's right.

Q. From 1946 on, as far as you know, his apartment has been his office, and I say "his apartment," I mean Apartment 401 at 69-10 Yellowstone Boulevard?

A. That's right.

Q. He had as many as four phones in his apartment?

A. When I visited him, he had about four phones there.

Q. What was your relationship to him in 1952?

A. We were on friendly terms. I couldn't live with him, [fol. 242] but I certainly would have done anything I could for him. We were friendly.

Q. Very friendly at that time?

A. We were friendly, not very friendly. But we were friendly.

Q. You had started a proceeding against him in September of 1951, in which you sought to increase the alimony?

A. Yes.

Q. Did he contest that?

A. He came to court.

Q. And testified?

A. Yes.

Q. And you testified?

A. That's right.

Q. Did your sister testify in that proceeding?

A. She didn't know anything about it.

Q. She testified in the first proceeding in 1946?

A. That's right.

Q. It was during that hearing that he told you that if you had wanted an increase in the alimony, all you had to do was ask for it?

A. Not during that hearing. After I got the notice that he had advertised in the Jewish paper, when I advised him, [fol. 243] he had said that. Not during the hearing for my increase.

Q. I am confused.

When was the hearing for the increase in alimony?

A. That was, I think, in January.

Q. About January 29, 1952. Is that correct?

A. Around that time. I don't recall the exact date.

Q. What was the date of the judgment or the decision in which you got the increase? Was it about April 1?

A. I don't recall exactly when it was.

Q. What was its relationship to your visit to see him?

A. My visit to see him was regarding the notice that he had advertised.

Q. I do not want to interrupt you, but counsel examined you and exhibited to you some judgment that you said you had heard of but had never seen.

A. That's right.

Q. Do you know when you got the increase?

A. To me, it was shortly after the hearing.

Q. Shortly after the hearing?

A. I think it was shortly—about a month or so.

[fol. 244] Q. Did you get the increase before you went to see him at his apartment or after you went to see him?

A. No. I think after.

Q. You got the increase after?

A. No. The increase was before I went to see him.

Q. You got the increase before you went to see him?

A. I think so. I am almost sure I did.

Q. Let us be as positive as we can.

A. It's almost ten years ago.

Q. When did you first learn of the increase?

A. Well, I learned about it in a very peculiar way. I don't know—I think it was the sergeant at arms who happened to get my phone number and called me up and said that I was so nervous, that my lawyer had gotten word that he had received an increase, and the next day I was notified by Mr. Mayer.

Q. Had you talked to Mr. Mayer about your divorce or the divorce proceedings that your husband had instituted at the time he advised you of the increase?

A. No. I never spoke to Mr. Mayer about a divorce.

Q. This paper that counsel handed you indicates it was filed on April 1, 1952. It is your impression now that it [fol. 245] after April 1, 1952, when you visited your husband's apartment and discussed the divorce proceedings?

A. I think it was during the early part of April. I'm not sure whether it was March or April. I can't recall.

Q. Let us see if we can pin it to something that seems to me to be very natural.

How long after you received the notice that he was applying for divorce was it that you went to see him?

A. I called him within a day or two. It must have been about three days.

Q. Then three days after you got the notice that he had sued you for divorce, you went to see him?

A. About that time.

Q. Give me some idea. Would you say the day you received the notice he was suing you for divorce?

A. No. It was the next day. I visited my sister, and I called him up.

Q. Then you went to see him the following day?

A. That's right.

Q. Here is the file in this case which shows that this notice is dated March 11, 1952. Will you examine that original and see if that is the notice that you received, as best you can recall.

[fol. 246] A. I never received this notice. It was a typewritten copy that I received. Probably that's why I don't recognize it.

I received a typewritten copy, not a printed copy.

Q. You say you received a typewritten copy?

A. Yes.

Q. Who sent it to you?

A. I don't know. It came registered mail, the notice, and I signed for it. I don't recall exactly who sent it to me.

Q. What day did that notice require you to appear in the Circuit Court of Dade County?

A. I don't know. I don't remember.
Q. What did you do with that notice?
A. I took it with me to Mr. Simons' home.
Q. Then after you took it there, what did you do with it?
A. I gave it to my attorneys.
Q. Who was it to whom you gave it?
A. I gave it to Mr. Steinbrink first.
Q. When did you give it to him?
A. When I went there to inquire about my status.
Q. When was that?
A. It was about a week after Mr. Simons' death.
[fol. 247] Q. Then you kept this note until after Mr. Simons' death?
A. That's right.
Q. Where did you keep that notice?
A. Where did I keep it?
Q. Yes, ma'am.
A. I had that notice.
Q. May I see it, please.
A. I don't have it.

Mr. Sibley: Will counsel please deliver the note that was delivered to the associate in New York?
Mr. Ward: I do not have it.
Mr. Rosenberg: I do not know anything about it.
Mr. Ward: The notice that proceeding had been filed against her for divorce—she said she kept it, and she delivered it to Mr. Steinbrink.
You employed him in this case?
The Witness: Yes.
Mr. Sibley: Will any of counsel here tell us if they have that notice and produce it, please?
Mr. Ward: I told you, Mr. Sibley, I do not have it.
Mr. Sibley: Any of the rest of you?
Mr. Rosenberg: I am not familiar with it.
Mr. Ward: Let us see the record, the original file. Let [fol. 248] us see whether there is any date that would give us any lead.
I think what you are talking about is a copy of the complaint that they mailed up there.

Mr. Sibley: Does anybody have a copy of the complaint that was mailed to her?

Mr. Ward: I do not have it.

Mr. Sibley: Does any counsel have it?

[No response]

By Mr. Sibley:

Q. You kept this notice, notice of service, and you did not deliver it to your attorney until after Mr. Simons' death?

A. Yes.

Q. Where did you keep it all this time? Was it in your safety deposit box?

A. No, just in the drawer. I took it very casually, because he told me to pay no attention to it.

Q. If you took it casually, why did you deliver it to your attorney after Mr. Simons' death?

A. I gave it to him, because I showed him that was the notice I had received.

Q. Of the divorce proceeding?

A. Not the divorce, but that he had instituted—that he had advertised in the Jewish paper that he was suing me for divorce.

[fol. 249] Q. Was this your cousin with whom you first discussed this proceeding that had been filed?

A. Yes.

Q. When did you first discuss it with him?

A. About a couple of days after Mr. Simons' death.

Q. You discussed it with him first?

A. Yes.

Q. What is your cousin's name?

A. Frank Levien.

Q. He is an attorney in New York?

A. Yes.

Q. He sent you to Mr. Steinbrink?

A. Yes.

Q. Is that his partner?

A. Yes.

Q. Who is Mr. Allan, an attorney you consulted about this notice immediately after you received it?

A. Oh, yes. I called him. I'm sorry.

He said there is no validity to that. He said, "Pay no attention to it."

Q. Mr. Allan told you after you received the notice that you were being sued for divorce, that it had no validity in New York?

A. Yes, sir.

[fol. 250] Q. And told you to pay no attention to it?

A. Yes, sir.

Q. He also told you, did he not, that New York did not recognize Florida divorces?

A. Well, I had no divorce at the time.

Q. That is what Mr. Allan told you, did he not?

A. Yes.

Q. So, after Mr. Allan told you to ignore it, that it meant nothing, New York did not recognize Florida divorces, you put it away and forgot about it?

A. That's right.

Q. Did you go to see your husband after Mr. Allan told you to forget all about it or before?

A. No. I think before.

Q. You went to see Mr. Allan first?

A. No. I think my husband first.

Q. Let us be sure about that.

A. If I called my husband a day or two after I got it, I must have seen my husband first.

This is ten years ago. I can't remember the exact date or time or hour.

Q. How long after you spoke to your husband was it that you went to see your lawyer, Mr. Allan?

A. I didn't see him. I spoke to him.

Q. You telephoned him?

[fol. 251] A. Probably. I don't know. It was not very long after.

Q. Three or four days?

A. Probably.

Q. After your discussions that you had detailed with your husband, you were still disturbed and wanted the advice of an attorney, did you not?

A. Well, I wanted a little verification.

Q. Sure. When your attorney told you that the Florida divorces were not recognized in New York, to forget about it, were you then satisfied?

A. I was satisfied when my husband told me that.

Q. But you were not satisfied enough, so you went to see a lawyer?

A. A great deal depended on my alimony, that my alimony was continuing, you see.

Q. What was dependent upon it?

A. My existence.

Q. Mr. Allan told you that even if he got a divorce in Florida, he would have to pay the New York alimony, did he not?

A. No.

Q. He did not?

A. No. I didn't discuss a divorce with him at all.

[fol. 252] Q. I thought that is what you were disturbed about, that you would not get your alimony.

A. I wasn't disturbed, because my alimony had continued to come in, and I wasn't disturbed about that.

I wanted to know how Mr. Simons was going to react to that paper I got. When he said, "Destroy it. Pay no attention to it. It was done in a fit of temper," I did. I did just that.

Q. You did not destroy it.

A. Destroy it?

Q. You did not destroy it, did you?

A. No. I didn't go around destroying papers.

Q. Of course not.

When he told you, when he said, "Just destroy it," you had better sense than to do that?

A. I hope so.

Q. You really had better sense than to rely on what he said, because you did keep it?

A. Well, I wanted to see if any alimony would come. When it started coming in, then I paid no more attention to it.

Q. You mean you wanted to see if your alimony continued after he got the decree of divorce?

A. No, after the notice.

Q. After the notice?

[fol. 253] A. If anything further had been done.

I received no further notice. That was the final notice and the only one that I received.

Q. That is all the notice you got?

A. Yes.

Q. Did you deliver this notice with the papers that were included in the notice to your cousin, or did you deliver them to Mr. Steinbrink?

A. Mr. Steinbrink.

Q. Did you tell your cousin about these papers?

A. No. I had not seen him. He was too busy.

Q. I thought you said—maybe I misunderstood you. I thought you said, and I do not want to confuse us, that first, about two days after Mr. Simons' death, you went to see your cousin.

A. Yes. But I didn't have any papers with me.

Q. You first discussed your problem with him?

A. Yes. Then he called Mr. Steinbrink.

Q. Right then?

A. Yes.

Q. How long after that was it that you brought the papers back to Mr. Steinbrink?

A. Probably—I don't know—maybe two, three weeks. I don't know.

Q. You do not remember?

[fol. 254] A. No, I don't remember.

Q. The first attorneys you employed in Florida in this transaction were Mr. Martin Fine and Mr. Bernard Jacobson?

A. I didn't employ them. Mr. Steinbrink did.

Q. Well—

A. I never met them.

Q. Mr. Steinbrink hired all the lawyers you have here, did he not?

A. No.

Q. Mr. Steinbrink hired Mr. Fine and Mr. Jacobson?

A. Yes.

Q. Is Mr. Steinbrink connected with this case now?

A. No, not at all.

Q. When did you dispense with his services?

A. I dispensed with Mr. Fine and Mr. Jacobson—you see, they came directly through Mr. Steinbrink. I never met those gentlemen, Fine and Jacobson. I never met them or corresponded with them.

Q. Do you recognize this photostat of your signature on this paper [indicating]?

A. Yes, sir.

Q. That is a photostat of your signature?

[fol. 255] A. That's my signature.

Mr. Sibley: I would like to have this marked for identification. It has been identified once, but I would like to have it identified.

The Court: Defendant's A-1 for identification.

[The document referred to was thereupon marked "Defendant's Exhibit A-1."]

Mr. Ward: That was identified on the deposition.

Mr. Levenson: It was.

By Mr. Sibley:

Q. Mrs. Simons, did you consult with Mr. Allan before you consulted your sister or not about notification of the divorce proceeding in Florida?

A. No.

Q. You consulted your sister first?

A. I spoke to her over the phone. I never showed her the paper, and I said, "I got a paper that says that Sol has advertised in a Jewish paper. I don't know what to do," and I said, "I'm coming up to see you," and I called him from her house.

Q. Where did you live at that time?

A. Beacon Hotel.

Q. Where did she reside?

A. At 325 Riverside Drive.

Q. How far apart?

A. It's from 75th to 105th.

[fol. 256] Q. So, you went up to her apartment?

A. That's right.

Q. You made the call from her apartment?

A. That's right.

Q. After you made the call from her apartment, you invited her to go with you to have a chat with your husband?

A. No. I just didn't want to go alone. I asked her if she would go with me—not to have a chat.

Q. By any chance did you wish a witness with you?

A. No. I just didn't like to go alone regarding a thing like that, and I just figured I would rather have company than go alone. That was all.

Q. When was the last time you saw the notice and complaint or copy of complaint that you delivered to Mr. Steinbrink?

A. Not since the day I went there with it.

Q. I beg your pardon?

A. Not since the day I brought it there.

Q. When you got your present counsel in the place of counsel you originally had, Mr. Jacobson and Mr. Fine or Fine and Jacobson, did you go back to Mr. Steinbrink and request the paper you delivered to him?

A. Yes.

[fol. 257] Q. Would he give them to you?

A. Yes.

Q. When he gave them to you, what did you do with them?

A. I don't know. I thought I had given them to Judge Gertler. I may not have given them all, but I gave him all I could find.

Q. When you went back to Mr. Steinbrink to get your papers, what papers had you delivered to him?

You delivered to him the notice?

A. The entire thing about my separation.

Q. And your notice?

A. And the notice.

Q. Did he give you a receipt for your papers?

A. No. I asked him to send whatever he could to my attorneys here in Florida.

Q. You did not go pick up the papers yourself?

A. No.

Q. Then this paper we are looking for is either in the hands of Mr. Steinbrink or Mr. Gertler?

A. I think so.

Q. Did Mr. Steinbrink advise you that he had delivered all your papers to Mr. Gertler?

A. I didn't have any correspondence with him.

Q. Have you talked to him?

[fol. 258] A. Over the phone.

Q. He told you he delivered everything to Mr. Gertler?

A. He said he wrote to Mr. Fine.

Q. To deliver everything?

A. Yes, whatever he had.

Q. Then what he did was he asked Mr. Fine to deliver everything, all your papers, to Mr. Gertler?

A. I imagine so. I wasn't there during the conversation.

Q. Would you be kind enough to tell me, as best you can recall, this conversation that you and your sister had with Mr. Simons during March or early April, 1952?

A. It was a very short conversation. We arrived there—it must have been about one or one-thirty. There was no one there.

Q. In the afternoon?

A. In the afternoon, and we just—I went in, and he greeted us both, and we sat down. We passed the time of day, and I said, "What does this paper mean?"

He didn't even look at it. He said that he was in a fit of temper. He said, "I was in a fit of temper when I did that. Pay no attention to it, because I'm not going through with it.

"I have told you several times that I will never give you a [fol. 259] divorce, and I will never get a divorce, because I am not going to let you marry, and I will not be a three-time loser."

Q. I beg your pardon?

A. Yes. He had been divorced before I married him.

Then we spoke about my nephew. He was going to be confirmed, bar mitzvahed, the following year. It was a very general conversation. We were there no more than a half hour.

Q. Had your hearing in New York on the 29th of January, 1952, been a very pleasant hearing in which you and

he were communicating, or was it a bitter hearing between the lawyers and you?

A. I don't think it was a bitter hearing. It was a regular routine hearing.

Q. Did he take as routine your effort to get more money out of him for alimony?

Mr. Ward: Your Honor, that is getting into argument.

Mr. Sibley: I withdraw the question.

The Witness: About $10 a week more, because I had been ill, and I had lost my job, and my taxes were very high.

By Mr. Sibley:

Q. Do you know Mr. Simons' signature when you see it? [fol. 260] A. Yes.

Q. I want you to take a look at this paper I am going to hand you and envelope, and tell me if you recognize his signature and recognize his handwriting. Look at the signature first.

A. That is his signature, yes.

Q. I have no objection to your reading it.

Mr. Ward: The question was, does she recognize the signature.

The Court: He told her she could read it if she wanted to.

Mr. Sibley: I have no objection to her reading it.

The Witness: This is such a falsehood.

Mr. Ward: Do not comment. Let me see the letter. Let me see whether I have an objection.

Mr. Sibley: I cannot offer it. I am not offering it.

She is on cross examination. But I do not mind your reading it.

The Court: Let us go ahead.

Mr. Sibley: I want to be sure. This is a matter that is referred to in his will.

I will ask Your Honor to mark this for identification, as [fol. 261] the witness said she recognized the signature.

The Court: A-2 for identification.

[The document referred to was thereupon marked "Defendant's Exhibit A-2."]

By Mr. Sibley:

Q. Do you recognize this as a letter that you wrote to Mr. Simons in November, 1957, at 1110 Venetian Way, Miami Beach, Florida? Is that your handwriting, and did you write that letter [indicating]?

A. Yes, that is my writing.

Mr. Sibley: I ask Your Honor to mark this for identification, if you will, please.

The Court: A-3 for identification.

[The document referred to was thereupon marked "Defendant's Exhibit A-3."]

Mr. Ward: Is there any way you can identify the date?

Mr. Levenson: November 20, 1957.

By Mr. Sibley:

Q. Did you write many letters to him at his address, 1110 Venetian Way, Miami Beach?

A. No. Once in a while I would write him. I always wrote him to Forest Hills. But if he was away on vacation, I would send him a duplicate sometimes.

Q. You always sent two letters, one for Forest Hills and one to Miami Beach, did you not?

[fol. 262] A. In case he was away. But every time I spoke to him, he was in Forest Hills.

Q. You did not speak to him between 1951 and the time of his death, did you?

A. Oh, yes, sir.

Q. Are you sure?

A. Yes.

Q. Mrs. Simons, the feeling between you and him was one of hatred, was it not?

A. No, sir. I don't hate anybody.

Q. Put it this way: On his part, it was?

A. I don't think he hated me. He was upset, because I was successful. I don't think my husband hated me. I am sorry.

Q. Were you always successful in getting—

A. No, sir. I never asked for anything, and I never got anything.

In fact, the first thing I did when I left my husband was to close up his charge accounts. I did that myself.

Q. I do not suppose you have any knowledge of whether or not he always charged off the expense of his apartment in New York against his income tax as an expense of his office?

A. What do you mean?

[fol. 263] Q. You said you knew something about his business. I just wondered if you recalled that he carried his apartment in New York as an office and charged it off.

A. He did that since '41, just that one room.

Q. Of course, you do not know what his practice was after you left him?

A. No.

Q. But you did know prior to the time you left that he did consider it as a business location?

A. No. That was my home.

Q. I understood you to say he always charged if off against—

A. He never had an office. His business was transacted by telephone or in my dinette where we have a filing cabinet.

Q. I understood you to say that his apartment was his office.

A. Well, it was my home, and he had his office in my kitchen there. He never had an outside office.

Q. That was the only office he had?

A. That's the only office he had. That was his home.

Q. And it was his office?

A. Yes. He didn't need an office.

Mr. Sibley: Your Honor, at this point, in order that I [fol. 264] may continue my cross examination, if possible, I want to ask Mr. Gertler if Mr. Fine or Mr. Jacobson delivered to him the notice in reference to this; did they deliver any papers to counsel?

Mr. Gertler: I never got that.

Mr. Sibley: Did they deliver any papers to counsel?

Mr. Gertler: They delivered some papers to me, which I turned over to you.

Mr. Rosenberg: The only thing I recall is a carbon copy of a New York proceeding and resignation as counsel, and a motion for substitution. That is all I remember.

Mr. Sibley: Have you examined your papers to see if you have it?

Mr. Rosenberg: I will be glad to.

Mr. Ward: We will go through everything we have.

[Informal discussion off the record]

By Mr. Sibley:

Q. Did you advise your sister of the advice Attorney Allan had given you in reference—

A. I don't recall. I don't think I did.

Q. You may have?

A. I don't think I did.

Q. You say you spoke to him on the telephone in 1951 and thereafter. Is that correct?

[fol. 265] A. Well, just that one time.

Q. On the telephone?

A. Yes.

Q. That is the only time you spoke to him?

A. Yes.

Q. That was some time in March or early April, 1952?

A. That's right.

Q. What was the telephone number that you called?

A. I don't remember.

Q. You gave us something in the deposition.

A. Ten years ago, I couldn't remember my own phone number.

Q. You remember the exchange, do you not?

A. No, I don't.

Q. Do you remember your testimony that you gave in this case April 26, 1962? Do you remember that you gave testimony?

A. Yes.

Q. In deposition?

A. If you don't have those papers, I probably gave them to you [indicating], I thought I did.

Q. Mrs. Simons, I am going to read from your deposition which was taken in our office, 605 Lincoln Road, 10:00

[fol. 266] a.m., on April 26, 1962. Do you recall being there?

A. Yes. I made some mistakes in that deposition.

Q. Did you make some mistakes?

A. Yes, sir.

Q. Would you mind telling us, your best recollection, what mistakes you made?

A. I don't know why, but I had said that I had no attorney in 1951 or 1952. But it was such a trivial matter, it completely slipped my mind. I had Jerry Mayer.

Q. You did have him?

A. Yes. But it completely slipped my mind. Questions were thrown at me so rapidly, that I didn't get a chance to think. It completely slipped my mind that I had Jerry Mayer.

It amounted to $10 a week, and I just simply forgot about it.

Q. Have you examined a copy of the correspondence between Mr. Simons and Mr. Greene in reference to Mr. Greene's conversation with Mr. Mayer?

A. I heard.

Q. Frankly, after you got this notice, and at the time of this award, you did have some conversation with Mr. Mayer about this divorce?

[fol. 267] A. No, sir.

Q. None whatever?

A. No, sir.

Q. Were you talking to Mr. Allan at that time?

A. No, sir. I just spoke to Mr. Allan once.

Q. I understand.

A. After that, I did nothing further.

Q. With what firm was Mr. Allan connected?

A. With Weishen, Celler, Allan & Spett. This is ten years ago. He may still be living or may be dead. I don't know.

In 1946, when you brought your proceeding for separate maintenance of alimony, you were represented by that firm, were you not?

A. Yes, sir.

Q. That is Congressman Celler's firm?

A. Yes.

Q. When you got this notice of divorce in March of 1952, you then called Congressman Celler's firm?

A. No.

Q. Mr. Allan, I mean, of the firm. But at that time you were not using Mr. Allan or Congressman Celler's firm in your application for increase?

A. No. It was so trivial a thing.

Q. The receipt of this notice of divorce was not classi-
[fol. 268] fied as a trivial matter in your mind, and that is why you called the big firm?

A. I was shocked when I received it, and after having spoken to him, I just took my husband at his word.

Q. After you spoke to Mr. Allan, you relaxed, did you not, because he told you to ignore it?

A. You always look for a double verification.

Q. That is right.

I am going back to your testimony on page 13 in reference to the number you called in order to reach your husband, and you said this at the top of page 13:

"I called him from the Beacon Hotel or—no. I was at my sister's house on Riverside Drive.

"Q. You called him from your sister's house?

"A. Yes.

"Q. Do you recollect what her telephone number is?

"A. Academy 2-8815."

A. Which is a wrong number. I just forgot her number.

Q. "Q. You called him from that number?

"A. Yes.

"Q. What number did you call?

[fol. 269] "A. I know it was a Havemeyer number. I don't remember the number now. It was changed.

"Q. Where did you call him?

"A. In Forest Hills."

Further at the bottom of the page:

"Q. You called him at a phone number. You do not remember that number?

"A. I called him from my sister's home.

"Q. To where?

"A. I know it was to a Havemeyer number. I don't remember his number by now."

A. That's right.

Q. Then it was a Havemeyer number?

A. I think it was, or it had been changed to Illinois. It was one of those two numbers. I looked it up in the phone book.

Q. When did you look it up to determine it was an Illinois number rather than a Havemeyer number?

A. I don't know. The number had been changed, and I got the number—it was originally Illinois changed to Havemeyer or Havemeyer to Illinois. This is a long time ago.

Q. You testified on April 26 that it was a Havemeyer number, and now you say it is an Illinois number.

[fol. 270] A. I said that it was changed.

Q. You said it was a Havemeyer number, and you said you knew it was a Havemeyer number. That is what you testified to.

A. I told you I didn't remember the number. I can't remember ten years back. I can't remember every little thing.

Q. Now you are of the opinion since April 26, 1962, it is an Illinois number?

A. No, no. What I am saying is that it was either an Illinois number or a Havemeyer number. But the number has been changed. I don't know whether it was changed from Havemeyer to Illinois or Illinois to Havemeyer. I don't recall.

Q. When did this determination on your part that it might be an Illinois number occur to you, before or after your deposition?

A. I never thought about it. I just know the number had been changed.

Q. You were so positive here. "I know it was a Havemeyer number." That is what you said on page 13.

Now, after being so positive on April 26, how do you come up with an Illinois number?

A. I looked it up in the phone book. He was in the phone book at this time. But I still don't know whether it was a

[fol. 271] Havemeyer number or an Illinois number, which it was right now.

Q. You know it is Illinois?

A. No. I knew it had been changed.

Q. You know it is Illinois and looked it up in the phone book after your deposition?

A. No. Just recently it was in the phone book, this last month, and just for curiosity—I just wanted to see if it was.

The Court: It was since the deposition. Let us go ahead.

By Mr. Sibley:

Q. As I understand it, you said you called him only one time from 1951 until his death, and that was in March of 1952 or April.

A. I called him once, and this woman hung up on me.

Q. That is twice?

A. After 1952, he had me out to dinner. I met him, and he took me to dinner.

Q. I am talking about telephone calls. You testified, and I do not want to confuse you—you testified that you had only talked to him once from 1951 until his death, and that was—

A. No, sir. I said that was regarding the notice. I had spoken to him several times.

[fol. 272] I called him most times when I received my check—when my checks were late.

Q. You wrote him when the checks were late. You made a record?

A. But I called him.

Q. Then you called him how often?

A. It might have been once a month I spoke to him. I would tell him—he would say to me, "If your checks come late, let me know."

He would date the checks the first, and I would get them on the 16th. He would date them on the 16th, and I would get them on the 29th.

So, for a while, I kept calling him, telling him my checks were late. When they came, I called him and thanked him. Later on I expected them on that date and stopped calling.

Q. When you called the one time and the lady hung up, did you call any more, and did she hang up?

A. Every time I called up, Mr. Simons spoke to me.

Q. He spoke to you?

A. Yes.

Q. The day that you went out to see Mr. Simons in March or April, 1952, where did you meet your sister before you departed?

[fol. 273] A. I don't recall whether she came to my hotel or I met her on 59th Street. I don't recall just where it was.

Q. Let me ask you this question: Have you read your sister's deposition?

A. I read all the depositions.

Q. You read them all?

A. Yes.

Q. You are thoroughly familiar with the conflict in your deposition and hers?

A. These are just mistakes. They are not conflicts.

Q. You are prepared to correct them all?

A. Yes.

Mr. Sibley: That is all.

The Witness: I just didn't remember. It was so inconsequential, whether she called for me or I met her at a subway station. It seemed to me it was.

Mr. Ward: No questions.

Could we have about five minutes?

The Court: Yes.

Mrs. Simons, I want to get this straight. When was it that you went to see Mr. Simons, and you stated he was angered, in a general sense, that you had applied for an increase in your alimony payments in New York? Had you [fol. 274] then been notified of the divorce suit?

The Witness: I don't recall, sir, whether this was before I got the increase or after. When I first applied, I had not been notified.

The Court: You testified you went to see Mr. Simons, and he was angered, because you had filed these proceedings to increase alimony payment.

At that time, had you received notice of the pendency of the Florida divorce suit?

The Witness: I must have received the notice. That is why I went to see him.

The Court: Your statement is that Mr. Simons said to you, why didn't you take it up with him?

The Witness: Yes.

The Court: Your reply was that you wanted to make it legal?

The Witness: Yes, sir.

The Court: My question to you now is, when Mr. Simons told you to ignore the process and the divorce suit, what did you do to make that legal, if anything?

The Witness: I did nothing.

[Witness excused]

The Court: We will take a ten-minute recess.

[Thereupon a short recess was taken, after which the following proceedings were had:]

[fol. 275] Thereupon: HELEN FORMAN was called as a witness on behalf of the plaintiff and, after having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Ward:

Q. Please state your name, and speak loud enough to where the court reporter can hear you.

A. Helen Forman, Mrs.

Q. Mrs. Forman, what relationship, if any, are you to the plaintiff in this cause?

A. Sister.

Q. Did you know Sol Simons, the deceased?

A. Yes.

Q. I believe you have previously given your deposition in this case in New York on June 15, 1962?

A. Yes.

Q. Do you recall an occasion, Mrs. Forman—put it some time in March or April, 1952—when you and your sister visited Mr. Sol Simons?

A. Yes.

Q. State to the Court as concisely as you can the circumstances, approximately the time, if you can fix it.

[fol. 276] A. Well, the time that we visited him was in the early part of an afternoon. I don't recall the day. I know it wasn't Saturday or Sunday or Monday. That I know. I don't know what other day it was.

Q. What was the occasion for the visit?

A. Well, my sister had telephoned me that she had gotten a—what she might have said was a petition—I don't remember exactly what it was, and what should she do.

I said, "Call up Sol and ask him what it's all about."

She came to my home to do that, and when she called him up, I heard her say to him, "What does this mean?"

Then I heard her repeat, "Tear it up?"

Then I heard her say to him—when she got all finished, I said, "What is it?"

She says, "Well, he says I should come over and talk to him. Will you go with me?"

I said, "Yes, I will go."

Q. Did you go the next day?

A. Yes.

Q. With your sister?

A. Yes. We went the next day.

Q. Where was Mr. Simons?

A. At his home, 69-10 Yellowstone Boulevard.

Q. How far was that from your home?

[fol. 277] A. Well, anywheres from forty-five minutes to—within an hour's time, forty-five minutes to an hour.

Q. Do you recall where you met your sister?

A. Well, I think I may have gone to her place. I'm not quite sure whether we met on the subway station or—I just don't recall.

Q. When you went into Mr. Simons' apartment, who else was there?

A. Just he.

Q. Do you recall whether you went right upstairs or called from downstairs?

A. No. We took the elevator. I think it was the third floor. I think it was the third floor.

Q. Did Mr. Simons greet you personally, or did he have a maid there?

A. No. He opened the door himself.

Q. What did he say when he opened the door?

A. He said to Lucy, "Hello, Lucy," and when he saw me, he sort of was surprised and said, "Hello, Helen."

I said, "Hello."

Q. Then what happened? Did you stand in the hall or foyer?

A. No. We went in and sat down in the living room.

Q. What was the conversation that you overheard?

[fol. 278] A. Well, Lucy said to him, "What does that paper mean?"

He said, rather sheepishly, "Oh, forget it. Tear it up. It's of no consequence. Just forget it."

Q. Did he make any explanation as to why he filed it?

A. Well, I don't recall. I don't recall whether he did or not. But he simply told her to tear it up and forget it, and we went into a general conversation of "How are you?" and so forth and so on.

Q. Was the paper itself displayed and discussed?

A. No.

Q. Had you seen the paper yourself?

A. No. My sister had told me over the phone, but I had never bothered to look at it.

In fact, I just didn't feel like, you know—we let it go.

Q. Let me see if I can recall correctly, because it may be duplication. Do you remember who started the conversation about the Florida proceeding? Did your sister start it or did he start it?

A. No. When she came in, she said, "Sol, I'm here because you told me to come up. What does this all mean?"

[fol. 279] He said—he sat down, and he says, "Oh, forget it. It doesn't mean anything. Tear it up."

Q. Do you have any idea how long he had been in New York at the time?

A. Well, I don't know. I presume he had been there. I know he was always in the telephone book, and he called me up once or twice to ask me where Lucy was. He tried to get her.

I mean, so far as Mr. Simons and I were concerned, we never had any words.

Q. Can you fix with any degree of accuracy the approximate time of the month—what month it was, what time of the month, whether it was March or April or May or June?

A. It was May or June. It might have been March or April, because I remember that I had—in the course of the conversation, he asked me about our one and only nephew that he had known. He lives not too far away.

I said, "Next year around this time the boy will be confirmed," and it so happened that the boy was confirmed the following March.

Q. According to that, you think—

A. I think it was March or April, some time around then. I don't recall.

Q. What was the length of the conversation?

A. Not too long.

[fol. 280] Q. Do you estimate five minutes, an hour?

A. No. I think we might have been there a half hour, maybe forty minutes. I mean, it was just general.

He started to tell me about his business and how successful he was. We just spoke of generalities.

Q. Then the thing he said was, "Tear it up. Forget about it."

A. That's all.

Q. When you left, did he show you out? Was he courteous?

A. Yes. He came to the door and said to me, "Don't be surprised. Lucy and I will get together yet."

I said, "That's your business."

There was no animosity.

Q. Did you see Mr. Simons at any time after that time?

A. I saw him once in his car driving along. But I didn't stop to speak to him.

Q. That was after 1952?

A. Yes. But I didn't speak to him.

Mr. Ward: That is all.

Cross examination.

By Mr. Sibley:

Q. Mrs. Forman, as I understand it, you saw him some [fol. 281] time in March or April, 1952?

A. Yes.

Q. You never saw him again after that to talk to him?

A. No.

Q. How long prior to that time had it been that you had seen him? You saw him in 1946 when you testified at the proceeding?

A. Yes.

Q. You had not seen him between 1946 and 1952?

A. No. I had seen him. I seen him drive by in the car. We waved.

Q. I mean, outside of—

A. No. I had not been to his home.

Q. You had no conversations with him from 1946 to 1952?

A. Oh, yes. He had called on the telephone.

Q. But you had never visited in his home between 1946 and 1952?

A. No.

Q. You never visited his home again between 1952 and the time of his demise?

A. No.

Q. Did you accompany your sister to see Mr. Allan, an attorney, in Congressman Celler's office?

[fol. 282] A. I don't recall.

Q. On page 53 of your deposition, which was taken as identified by Mr. Ward on June 15, 1962, in New York City, you gave this answer in reference to the divorce proceeding:

"A. Well, I know that there was a—something pending about it—there was something to do with a divorce which is not recognized in New York City, New York State."

A. It was not divorce. It was intent to divorce.

Q. I understand. But you there expressed the opinion that it was not recognized in New York, a divorce in Florida, and your sister has testified prior to your taking

the stand here that Mr. Allan, an attorney in New York, of Congressman Celler's office, had advised her that the divorce was not recognized in New York.

A. I don't recall.

Q. I am asking you, did Mr. Allan tell you that the divorce would not be recognized in New York City, New York State, or did your sister tell you that Mr. Allan said that?

A. No. I don't recall anything. I know that when I read in the papers sometimes about a Florida divorce, I often read a Florida divorce is not recognized in New York [fol. 283] State. That is from my own reading of different times, of different situations.

Q. Who had advised you before your deposition was taken that this divorce decree would not be recognized in New York City or New York State?

A. Nobody advised me.

Q. From where did you get that information?

A. Well, it's common knowledge in New York that a Mexican divorce or a Florida divorce is not recognized in New York State.

Q. Did your sister tell you that she did not consider the divorce that Mr. Simons got as valid in New York?

A. No. She never discussed it.

Q. You and she never discussed the divorce proceeding after your visit to Mr. Simons in March, 1952?

A. No.

Q. You never had any conversation with her at all about the divorce?

A. No.

Q. Did you have any conversations with her about her visit to or her conversation with Attorney Allan in reference to these proceedings?

A. No.

Q. Did you have any conversation with her in reference [fol. 284] to her consulting Mr. Mayer about this?

A. No.

Q. Then the only conversation you ever had in reference to these divorce proceedings was the conversation that took place at the residence of Mr. Sol Simons in March or April, 1952?

A. The intent. It was not divorce. It was a paper or petition for a divorce. I don't recall what.

Q. When you say the paper was a petition of intent, what gave you that impression?

A. Well, that's what he said. He said he didn't intend to go through with it.

Q. You said it was a paper of intent. Where did you get that?

A. Those are my own words. I don't recall.

Q. Did you read the paper?

A. No.

Q. Your sister had it and brought it over to show you?

A. No. She read it to me over the telephone.

Q. What did it say?

A. I don't know what it said. She had read over the telephone something about an intent or something about getting a divorce, and I didn't ask her. I don't happen to pry too much.

[fol. 285] Q. I understand. But you have a fairly clear recollection of what occurred two days later at Mr. Simons' apartment?

A. Yes. I can recall him very vividly.

Q. Can you recall very vividly your sister calling you and telling you she received this paper?

A. Yes. She telephoned.

Q. Can you recall very vividly her reading the paper to you over the telephone?

A. I don't remember word for word.

Q. No. I do not expect you to.

Tell me what the paper said.

A. I don't recall what the paper said. It said something about an intent or an action or something. I don't recall. I never saw the paper.

Q. An action for what?

A. To institute or to make. I don't remember. I never saw the paper.

Q. Was it an action that had anything to do with a divorce?

A. I don't remember.

Q. There was nothing about the paper that indicated its purpose was to get a divorce, as far as you know?

A. It was to file, I think, or to make mention of.

[fol. 286] Q. Of what?

A. Of his intent.

Q. To do what?

A. Of maybe trying to get a divorce. I don't know. I don't recall. It's ten years, Mr. Sibley. I don't recall exactly what the paper said.

All I know is that I overheard the conversation, and when I went there.

Q. Do not get to that yet. Let us go back to the paper first. Let us get rid of the paper first.

A. All right.

Q. Your sister had the paper with her when she went out there?

A. Yes.

Q. Is that right?

A. That's right.

Q. On the subway, on the way out, it took you forty-five minutes, did it not?

A. Yes.

Q. Did you have any curiosity to take a look at the paper?

A. No.

Q. You had no interest in it?

A. Well, I just didn't look. That's all. I had something [fol. 287] else on my mind.

I'm no attorney. I wouldn't understand the paper if I read it.

Q. I can see that. But you do have reasonable curiosity about your sister?

A. I did not look at the paper. It might have been stupid, but I just didn't.

Q. How did that paper look? How many pages were there to the paper?

A. I didn't look at the paper.

Q. You said she had it with her.

A. She had it with her, but I didn't look at the paper.

Q. When she got to the apartment, did she pull the paper out and say, "What does this mean?"

A. I think it was in an envelope. She said to him, "What does this mean?"

Q. Did you read what was on the envelope?

A. No.

Q. Did you see in the upper left-hand corner the Clerk of the Circuit Court of the Eleventh Judicial Circuit?

A. No.

Q. You did not look at the paper?

A. I did not look at the paper.

Q. She said, "What does this paper mean?"

[fol. 288] A. Yes.

Q. And he said, "Destroy it."

A. Yes.

Q. Then he handed it back to her, and she destroyed it?

A. I don't know what she did with it.

Q. Did you see what she did with it?

A. No.

Q. Did she destroy it?

A. I don't know.

Q. Did you ever hear of that paper again?

A. No.

Q. Did she put the paper physically in Mr. Simons' hand?

A. No.

Q. Just held it out?

A. Just held it out.

Q. She said, "What does this mean"?

A. Yes.

Q. What did he say?

A. He said, "Forget it. It means nothing. Tear it up."

Q. What did she say then?

A. She said, "All right."

Q. In other words, she said, "What does this paper [fol. 289] mean?"

He said, "It means nothing. Tear it up."

A. That's right.

Q. And she said, "All right."

A. Yes.

Q. Then what did she do with the paper?

A. I don't know. She may have put it back in her purse. I don't remember what she did with it.

Q. Did you talk to her about the paper in your forty-five-minute ride back?

A. No.

Q. Never mentioned it?

A. Never mentioned it.

Q. Did you discuss the divorce proceedings?

A. Nothing.

Q. Did you discuss what he said about the divorce proceedings?

A. Nothing.

Q. You went there to discuss the divorce proceedings, did you not?

A. I went to accompany her. I wasn't going to say anything one way or the other. I accompanied her.

Q. You knew the purpose of the visit?

A. The purpose of the visit was for him to tell her in his own words what to do with the paper. He said some-
[fol. 290] thing over the phone.

Q. She had heard what he said over the phone in his own words?

A. I presume so.

Q. You said she repeated them to you?

A. Yes.

Q. On the phone?

A. Yes.

Q. But she still wanted to go out to his apartment with you and have him tell her what to do?

A. He invited her out.

Q. He invited her out, but she wanted to go out to hear it from him?

A. He asked her to come over. I didn't know what she was going to discuss. He asked her many times to resume, to get together again. I didn't know what was going on.

Q. You knew she had the paper there with her?

A. Yes.

Q. You knew she was going to talk about the paper?

A. Yes. That was the purpose of the visit.

Q. You knew she went out there for the purpose of having him tell her to tear it up, did you not?

A. I don't know what the purpose was. He asked her to
[fol. 291] come over. He wanted to speak to her.

Q. Have you ever met Attorney Allan?

A. Yes, at the time of her separation.
Q. You testified in that case?
A. Separation.
Q. You had been to Mr. Allan's office?
A. Yes, to Mr. Mopper.
Q. His associate?
A. Yes. That's right.
Q. Mr. Mopper died?
A. Yes.
Q. Mr. Allan was then the one who was consulted?
A. That I don't know.
Q. Mr. Mopper handled the proceeding?
A. He handled the proceeding.
Q. He handled the separation?
A. Yes.
Q. Mr. Allan did not handle the separation?
A. No.
Q. Then what was the occasion for you to go see Mr. Allan after Mr. Mopper died?
A. I didn't see Mr. Allan. I wouldn't know him if I saw him.
Q. I thought you said you met him in his office.
A. No. At the time of the separation, I was in the office.
[fol. 292] It was a very large office with many rooms.
Q. You did not meet Mr. Allan?
A. I don't know Mr. Allan. I knew Mr. Mopper. He took my testimony.
Q. But you knew Mr. Allan was Mr. Mopper's associate?
A. Mr. Mopper was Mr. Allan's associate.
Q. You knew that?
A. Yes.
Q. You knew that after Mr. Mopper died, why, Mr. Allan was the one who handled this affair for your sister?
A. What affair?
Q. In reference to these proceedings in Florida.
A. No. I know nothing about it.
Q. Were you ever examined as a witness by Mr. Allan at any time?
A. I don't recall.
Q. Did you ever go to any lawyer's office after your visit

to Mr. Simons and make a written statement in reference to what he had said?

A. I don't recall.

Q. Did you or did you not?

A. I don't recall.

Q. You do not remember?

[fol. 293] A. No.

Q. In other words, if, after you went to Mr. Simons' apartment and came back and made some written statement to a lawyer, you do not remember it?

A. I never made any written statement to anybody.

Q. Neither you nor your sister considered what he had said was of sufficient importance to consult a lawyer about it?

A. No. We figured—I had no reason to doubt what he said was going to be untrue.

Mr. Sibley: That is all.

Mr. Ward: That is all. You may come down.

[Witness excused]

The Court: Call your next witness.

Mr. Ward: I want to put these in [indicating].

The Court: What is it?

Mr. Ward: Telephone listings.

Mr. Sibley: Do you have anybody to identify what years they are?

Mr. Ward: They are marked.

Mr. Sibley: Who marked them?

Mr. Ward: Mrs. Simons.

Mr. Sibley: One for 1954-1955, and one for 1961-1962?

[fol. 294] Mr. Ward: Yes.

Mr. Sibley: I have no objection.

Mr. Ward: We will straighten out the numbers.

The Court: Plaintiff's Exhibits Nos. 7 and 8.

[The documents referred to were thereupon marked "Plaintiff's Exhibits Nos. 7 and 8."]

Mr. Ward: Your Honor, we only have one other thing that is coming from the Clerk's office—two documents. I do not think we need to hold up the procedure. It is a cer-

tificate from the tax collector that he never filed an intangible tax return here in Florida.

Mr. Levenson: What is that?

Mr. Ward: And he never registered to vote here.

Mr. Sibley: He never registered in New York, either. If you will concede that, I will concede Florida.

Mr. Ward: We have those certificates.

Mr. Sibley: We are willing to concede he never registered to vote in New York or Florida. If you want to make that concession, we can get rid of that now.

Mr. Levenson: As far as the tax, I have a contrary affidavit.

Mr. Ward: We had better get the Clerk's office to straighten it out.

The Court: Maybe we ought to get some witnesses here. [fol. 295] You cannot cross examine pieces of paper.

Mr. Levenson: As far as voting, I have the records of both places.

Mr. Ward: We can stipulate that he did not vote in Florida.

Mr. Levenson: He did not vote in New York.

Mr. Rosenberg: Let us see what you have from the tax collector.

Mr. Ward: I will get the certificate. The Clerk's office has it.

Mr. Sibley: Here is the tax return [indicating].

Mr. Ward: We are shifting around between the tax collector's office and Metro. I want to be sure you have the correct record.

Mr. Sibley: Here is the return for the property tax [indicating].

Mr. Levenson: Here is the last New York resident tax return, 1951.

Note the addresses, Mr. Ward.

This is the certificate as to when he filed the return with the date and the return number.

The Court: Let us go ahead. If you have it, let us use it. If not, let us move on.

THE PLAINTIFF RESTS

Mr. Ward: We have that prepared, and it is being checked down there now in the office.

[fol. 296] Other than that, we rest. We can rest conditionally. It is a matter of record down there.

MOTION TO DISMISS AND ORDER THEREON

Mr. Sibley: Your Honor, at this point I wish to make a motion that the Court render a decree dismissing the complaint upon the ground that the plaintiff has not met the burden of proof fixed in cases of this character, where a bill in the nature of a bill of review is filed to set aside a divorce decree and the defendant husband is deceased at the time the bill is filed.

The burden of proof is upon the plaintiff under those circumstances—not a burden of proof of evidence, but he must have very clear and convincing evidence of fraud as required where a person charged with fraud is dead.

The rules invoked herein with reference to the burden and character of proof which must be carried and made in order to sustain a charge of fraud are all the more applicable in a case wherein, as here, the party charged with the fraud dies before testimony is taken. Indeed, in such a case parol evidence should be not only clear, positive, unequivocal and convincing but should be of a conclusive, or well nigh conclusive character.

We feel at this point the Court should grant our motion to dismiss this cause. We do not feel that this evidence has reached that burden.

Mr. Ward: We think it has, your Honor, for two points: [fol. 297] First, we think uncontradicted evidence, number one, of the fact that he did not establish in the file in this case—the record itself will not show any compliance with the usual requirements of residency or corroboration. Did he have an unqualified, clear-cut showing of these circumstances that he established a bona fide residence in Florida? He did not. The testimony clearly shows that he was in New York. He was there in the fall of the year. He was

in and out. He was back there on his cases with the hearings.

He had an apartment. He kept his business there, two automobiles, and he never made any change at all. There is no showing that he had any qualifications at all to come within the rule of giving this Court jurisdiction.

On the face of this document alone it shows that the decree was based upon erroneous conclusions by the Court, and so entered, that she had filed her answer in this case. That is a very pertinent situation, because under those circumstances, cutting out of any consideration of the wife or her alimony or anything of that type, such things, do not have a semblance of validity.

We think we have established that there is absolutely no way that this divorce could be said to be valid.

[fol. 298] Whether rightfully or wrongfully, she was led into a feeling, number one, he was in New York; that he had abandoned his procedure, whatever it was.

It is true the testimony is that based upon this oral interpretation, but Your Honor must consider the circumstances to verify and to justify and to build up the fruitfulness of those statements.

These papers here show the proceedings in New York, that he had started this movement in Florida incident to her filing of additional claims for alimony in the State of New York, Kings County. They were started in September, and these proceedings were pending.

He did nothing. There has been nothing in the record here to show any type of citizenship requirement as against the matrimonial domicile of the parties.

This is an important point. The matrimonial domicile of the husband and wife had been in New York, and it is not lost. There is a grave doubt even as to whether the man at any time became a sufficient resident of Florida even to qualify him under the statute.

It may be that New York is his domicile. Under those circumstances, when pending the determination by the special referee up there—the hearing took place on the 29th of January, 1952. Your Honor will notice from this file—do you have the original proceeding there?

[fol. 299] Here is an affidavit based as a part of that case sworn on the twentieth day of February.

Now, the divorce was not even started until, I think, the 11th or 12th of March.

There is all the testimony in the world in here that he was in New York. He was a resident of New York. He was doing business there. He was never out of New York more than one week, ten days at a time.

His maid's deposition says that at the most he would be gone for four weeks, and he would leave the money in advance. The testimony is uncontradicted, that he did go out from time to time. It was always business. His residence—he had it for seventeen years.

We have uncontradicted testimony so far. There is nothing in the file to show residence at all or time.

Did he have a ninety-day bona fide residence in Florida when he swore to that on February 20?

Did he have it March 11 when he filed the suit? The record does not show it, and the testimony here shows, until contradicted, that absolutely there is nothing to give this Court any semblance—and he continued under this arrangement. He never was required to pay anything at all under the Florida divorce decree.

Instead of that, he continued based upon the assur-
[fol. 300] ances.

Now, the reason we put in this letter of April 14 to Mr. Greene and from Sol Simons, and back and forth, is that with knowledge, Your Honor, with knowledge, apparently, of a certain kind of procedure in Florida, knowledge that on April 1 the New York court had substantiated this increase, that they sent her three payments according to that letter, which he offered in evidence. That was April 14, 1952, and that was after a conversation that took place between the wife and her husband, and later confirmed by the visit.

Now, something took place there. Something induced Mrs. Simons not to go ahead in Florida. The confirmation of the payments under this alimony, under the New York decree, came through by correspondence between the parties right in the face of those letters. It shows that he

was trying to trick somebody into running into Florida, to try to re-try the litigation up there.

This decree was entered on the thirtieth day of April, 1952. In the midst of the circumstances, without an iota of proof in here that he came through any of the requirements to prove residency in this state, and this is not in the nature of a bill of review. This is a direct attack to assign dower and to set aside this decree on a direct attack as to the invalidity of the Florida divorce as against her widow's [fol. 301] claim against his estate, wherever it may be located, Florida, New York, or wherever it might be.

We say clearly under the long line of cases and the Muckerman case is not contrary to this situation—we have Judge Gordon's opinion and Judge Carroll's affirmance. Our case is much stronger than that situation.

She acted upon it. She relied upon that. She was the wife of this man and would be his widow at the time of his death. Now she finds herself, under the contention of the bank, and it is their duty, no question, to fight for the will. We do not doubt that. It is probably the duty of any executor to try to uphold the will.

We had something like that in the Francis duPont case. The books were full of the other stuff about John Jacob Astor, when they refused to uphold his residence on such circumstances as this.

We, therefore, respectfully say that at this state of the proceedings, the motion ought to be denied.

Mr. Sibley: If Your Honor please, as I stated at the outset, the question of residence is not involved in this litigation. The question of residence was involved in the original litigation, which was the divorce, in which the defendant [fol. 302] was given an opportunity to defend and elected not to defend, in which the District Court of Appeals said the plaintiff has appealed from an order dismissing a bill of complaint in the nature of a bill of review to set aside a decree of divorce entered in the Circuit Court of Dade County, Florida, on January 9, 1946. The order dismissed the cause with prejudice and without leave to amend.

Now, they allege in that case that Macfadden, during his life, had filed this suit, and they brought in afterwards

where he had sworn he was a resident of New York and ran for some office up there during the period of time that he contended he was a resident of Florida. That case was dismissed, and the Court said in the case at bar, the appellant seeks to collaterally attack the decree some thirteen years after its rendition upon grounds which constitute intrinsic rather than extrinsic fraud.

The rule is and has been that those issues that could or have been litigated in the proceedings themselves are not sufficient grounds to collaterally attack a decree which otherwise appears to be valid on its face. As opposed to intrinsic fraud, the bill of complaint does not, in our opinion, allege facts which would constitute extrinsic fraud such as the deceased husband's fraudulently keeping the appellant from defending the action, keeping her in ignorance of the [fol. 303] proceedings, or other misconduct that would deprive the wife of an opportunity to have defended the action.

Now, that brings us down to one point, only one point. Has the plaintiff, by her conclusive proof, or well nigh conclusive proof, convinced Your Honor that the husband actually represented facts which prevented the wife and induced the wife not to defend, or is Your Honor of the opinion that there were other advices given to her which caused her not to defend these proceedings, and upon which she relied that the divorce in Florida would not be recognized in New York?

They have not carried that conclusive burden in their evidence. The bill of complaint should be dismissed and with prejudice.

The Court: I will reserve ruling on the motion.

I think the decree and divorce—I will say this for the benefit of counsel—is entitled to a presumption of correctness until the contrary has been shown. I do not think it is entitled to a presumption of incorrectness.

Call your witness.

Thereupon: SEYMOUR B. LIEBMAN was called as a witness on behalf of the defendant and, after having been first duly [fol. 304] sworn, was examined and testified as follows:

Direct examination.

By Mr. Sibley:

Q. Please state your name, sir.
A. Seymour B. Liebman.
Q. Where do you reside, Mr. Liebman?
A. Mexico City, Calle Tolstoy 18.
Q. How long have you been a resident of Mexico?
A. The last two years.
Q. Where did you reside prior to that time?
A. Shore Drive North, Miami, Florida.
Q. What was your occupation or profession when you were a resident of Dade County, Florida?
A. Lawyer.
Q. How long had you practiced law in Florida?
A. In Florida for eleven years.
Q. When did you commence to practice law here?
A. 1950.
Q. Where were your offices located?
A. My last office was 407 Lincoln Road.
Q. Did you practice law elsewhere before you came to Florida?
A. Yes. I am a member of the Bar of the State of New [fol. 305] York.
Q. How long had you been admitted to practice law in New York?
A. Since 1929.
Q. After you commenced the practice of law in Florida, did you meet a man by the name of Sol Simons?
A. I knew Mr. Simons for many years before I practiced law in Florida.
Q. You had known him in New York?
A. He was my client in New York.
Q. Did he consult with you in Florida in 1951?
A. Yes, sir.

Q. Do you recall the date that he first consulted with you?

A. I presume you mean in connection with the particular divorce matter?

Q. Yes.

A. Because I had seen him. Yes. It was in November of 1951, according to my best recollection.

Q. Do you have a memorandum here that would fix the date?

Mr. Ward: If Your Honor please, sooner or later we have to determine the point as to the ability and proper testimony of the lawyer. The fact that he was consulted, that is not privileged. What he might have told him, that [fol. 306] is either privileged or it comes under the self-serving doctrine, which I think is not subject to cross examination, because the client is dead.

I think it comes under the rule of objectionable testimony. I did not object to the first couple of questions.

The Court: I do not follow you. What is wrong with it?

Mr. Ward: If he is going to ask him what he did or what his advice was to that particular client—

The Court: He has not done that yet.

Mr. Ward: I had not objected to the last two or three questions.

The Court: Let us object when the question comes up.

By Mr. Sibley:

Q. He consulted you in November of 1951?

A. Yes, sir.

Q. Was there a memorandum that indicates your time in which he consulted you?

A. Yes, sir.

Q. Do you recall the first date that he consulted you?

A. It was a day or two prior to November 16.

Q. When did he consult you next?

[fol. 307] A. On November 16.

The Court: Is that 1951?

The Witness: 1951, at two o'clock in the afternoon.

By Mr. Sibley:

Q. What was the purpose of his consulting you?

A. In connection with a divorce proceeding that he wanted to commence against Lucy Simons.

Q. Did you advise him in reference to that?

A. Yes, sir.

Q. State whether or not you were employed to bring proceedings on his behalf.

A. I was, sir.

Q. On what date were you employed?

A. November 16, 1951.

Q. Thereafter, what did you do in reference to establishing his residence in Florida?

A. Well, there was a certificate of domicile that I had prepared and had him execute and had filed in the County Clerk's office.

Q. Is that the original of the certificate that you filed?

A. Yes, sir.

OFFERS IN EVIDENCE

Mr. Sibley: We tender in evidence this declaration of domicile and citizenship which has been recorded in Dade [fol. 308] County, Florida, and ask that it be made Defendant's Exhibit A.

Mr. Ward: May I ask a question here?

The Court: Yes.

Mr. Ward: Mr. Liebman, this instrument appears to be sworn to by a notary. I assume that is your signature?

The Witness: Yes.

Mr. Ward: On the 29th of November, 1951?

The Witness: That is correct.

Mr. Ward: Filed for record on the tenth day of December, 1951?

The Witness: Whatever the date of recording. It is stamped right on the instrument itself, sir.

Mr. Ward: He claims he became a resident here on the 19th day of November, 1951?

The Witness: Whatever the date is.

Mr. Ward: You mention in this, "I have signed a one-year's lease for my present apartment at 1110 Venetian

Way, Miami Beach, Florida, and have become associated with Fruit Sales Corporation, a Florida concern."

Did you prepare that lease for him?

The Witness: No. I read the lease. I did not prepare it.

Mr. Ward: You do not know what date that was signed? [fol. 309] The Witness: That lease was signed some time between November 16 and November 19 of 1951.

Mr. Ward: Who is Fruit Sales Corporation? Was that his corporation?

The Witness: Yes. That was the corporation I formed for Mr. Simons in the State of Florida.

Mr. Ward: When was that formed?

The Witness: I think November 19, 1951, or within a day or two.

Mr. Ward: We have no objection.

The Court: Defendant's Exhibit A.

[The document referred to was thereupon marked "Defendant's Exhibit A."]

By Mr. Sibley:

Q. Mr. Ward has asked you in reference to a lease signed by Mr. Simons. Have you ever seen Mr. Simons sign his name?

A. Yes, sir.

Q. Do you recognize his signature?

A. Yes, sir.

Q. Look at these leases, commencing with the one dated November 17, 1951, through the twenty-first day of September, 1959, and tell me whether or not each of those was signed by Mr. Sol Simons.

A. Each and every one of them has Mr. Sol Simons' [fol. 310] signature.

Q. That is his signature?

A. Yes, sir.

Mr. Sibley: If Your Honor please, we would like to tender in evidence—

The Court: Show them to counsel.

Mr. Sibley: I am sorry.

Mr. Ward: I have no objection for whatever they are worth.

The Court: Lease dated September 21, 1959, September 29, 1958, August 27, 1957, August 7, 1956, October 22, 1955, September 27, 1954, August 10, 1953, October 20, 1952, September 17, 1951, will be received as Defendant's Composite Exhibit B.

Mr. Levenson: The last one was November.

The Court: November 17, 1951.

It will be received as Defendant's Composite Exhibit B.

[The documents referred to were thereupon marked "Defendant's Composite Exhibit B."]

Mr. Sibley: Your Honor, would you indicate it is for the same address?

The Court: Whatever they indicate.

By Mr. Sibley:

Q. Did Mr. Simons take up residence on or about November 17, 1951, at the address 1110 Venetian Way, the prop- [fol. 311] erty described in the lease dated November 17, 1951?

Mr. Ward: I object to the form of the question, Mr. Sibley, because it calls for a conclusion. The word "residence" may be a legal conclusion.

The Court: The objection will be sustained.

By Mr. Sibley:

Q. Did he move into those premises?

A. Yes, sir.

Q. Do you recall when he moved there?

A. Either Saturday, Sunday or Monday.

My recollection is that I was there on Monday afternoon on the way home from my office.

Q. That was Sunday, you say? What date was that in November?

A. I think it was November 19.

Q. After that, did you visit at those premises, 1110 Venetian Way?

A. Yes, sir.

Q. How often were you over there?

A. I would say an average of three or four times a month.

Q. Commencing on Sunday, November 19, 1951?

A. It was either Sunday or Monday. I don't remember, Mr. Sibley. He wanted me to come over and take a look at [fol. 312] the place.

Q. Thereafter, you visited at this place three or four times a month?

A. That's right.

Q. Who occupied those premises?

A. He did.

Q. Was he there each time you were there?

A. Whenever I was there, yes.

Q. Do you recall, Mr. Liebman, any conversation with Mr. Simons in reference to having to return to New York for some litigation?

A. Yes.

Q. Can you give us some idea of approximately when that took place?

A. It was some time the beginning of 1952, the first month of 1952, that he had to go up to New York on an application that Mrs. Simons was making for an increase in alimony.

Q. Did he seek your advice as to whether this would interrupt his residency in Florida?

A. Yes, he did ask me.

Q. You advised him it would not?

A. That's correct, sir.

Q. After that hearing in New York, state whether or not he returned to his residence in Florida.

[fol. 313] Mr. Ward: I object to the question.

The Court: State when he returned to Florida.

The Witness: Yes, he returned to Florida.

By Mr. Sibley:

Q. Do you recall how long after that hearing, which occurred, I believe, as shown here, on January 29, 1952?

A. I think it was a matter of days.

Q. I tender you a letter and ask if you received that [indicating].

A. Yes.

Q. Whose handwriting is that?

A. That's Sol Simons'.

Q. Do you recall whether you received that in due course of mail after the date it bears?

A. Yes, sir.

Mr. Sibley: We offer it.

Mr. Ward: No objection.

The Court: Defendant's Exhibit C.

[The document referred to was thereupon marked "Defendant's Exhibit C."]

By Mr. Sibley:

Q. Do you recall whether he had to make another trip some place out of the State of Florida after he returned in accordance with his letter?

A. Yes. That is my recollection.

Q. Do you recall where he went after he left Florida the [fol. 314] second time?

A. Yes. He went up to Chicago.

Q. Did he advise you what the purpose of that visit was, or do you recall?

A. It was in connection with his business. It was a business trip that he was making.

Q. After he arrived in Chicago, did he write you a letter?

A. Yes.

Q. From Chicago?

A. Yes.

Q. Is that the letter [indicating]?

A. That is the letter.

Mr. Sibley: We offer it, Your Honor.

Mr. Ward: No objection.

The Court: Defendant's Exhibit D.

[The document referred to was thereupon marked "Defendant's Exhibit D."]

By Mr. Sibley:

Q. Mr. Liebman, do you recall how Mr. Simons returned from New York? The letter refers to the fact that he had been in New York on the 6th and 7th of March. Then he would return to Florida.

Do you recall how he returned at that time?

A. From New York to Miami?

Q. Yes.

[fol. 315] A. He drove down in his Cadillac. That is my recollection.

Q. I ask you to examine these gasoline tickets at several places on the way from New York to Florida and tell me if that is Sol Simons' signature on those.

A. Yes. These are all his signature.

Mr. Sibley: We offer these.

Mr. Ward: No objection.

The Court: Defendant's Exhibit E.

[The documents referred to were thereupon marked "Defendant's Exhibit E."]

By Mr. Sibley:

Q. I hand you a change of title on the Cadillac, 1950, certified from the Motor Vehicles Department, and ask you if this is a photostat of Sol Simons' name on that application of change and the date indicated.

A. Yes. That is his signature.

Mr. Sibley: We offer it.

Mr. Ward: No objection.

The Court: Defendant's Exhibit F.

[The document referred to was thereupon marked "Defendant's Exhibit F."]

Mr. Sibley: Gentlemen, I have here, and it will save considerable time if we can admit it, because I am going day by day to show where this gentleman was, a paid statement, [fol. 316] which was found among his original papers on his Cadillac, Nolan-Brown, March 17, and you notice there

is the number SS 91. It will save considerable time in bringing a witness in just to testify to that.

Mr. Rosenberg: This is just a repair bill.

Mr. Sibley: Repair in Miami of his Cadillac car.

We have been bringing him down day by day. I just want to show the day we get his car in and get it fixed.

Mr. Rosenberg: With a New York license.

The Court: Any objection?

Mr. Ward: No objection.

The Court: It will be marked Defendant's Exhibit G.

[The document referred to was thereupon marked "Defendant's Exhibit G."]

By Mr. Sibley:

Q. Mr. Liebman, I will hand you a photostat of a corporate charter and the records up to and through October, 1961, and ask you to examine each of these which has a photostat of Mr. Simons' signature and tell me if you can identify them, please.

A. Wherever the signature of Sol Simons appears, that is his signature.

On the certificate of incorporation—the certificate of in-
[fol. 317] corporation was prepared in my office.

Mr. Sibley: We offer it. The purpose of this, in order to save time, is to show the annual reports of the corporation signed by him, giving his residence address.

Mr. Ward: May I inquire, Your Honor?

The Court: Yes.

Mr. Ward: Mr. Liebman, what office did you hold in this corporation? In the certificate of incorporation, you specify as secretary, Seymour B. Liebman, Secretary. Who is Sylvia Mann?

The Witness: Sylvia Mann was a girl who worked in my office—my secretary.

Mr. Ward: Sol Simons was the deceased party in question?

The Witness: Mr. Sol Simons.

Mr. Ward: November 19, 1951. Do you know when the first meeting of this corporation was held?

The Witness: Within a day or two.

Mr. Ward: I notice on 17 July, 1952, you filed a certificate of this corporation, total outstanding capital stock, $300.

The Witness: The return I did not prepare.

Mr. Ward: Is that not your signature?

The Witness: Yes, as secretary, that is my signature. [fol. 318] Whatever it says. I am not denying it.

Mr. Ward: Did this corporation have any business purpose here?

The Witness: It had a very substantial account in the Miami Beach First National Bank. I think the account ran around $25,000.

He was doing business. I know that they filed income tax returns each year. In fact, I introduced Mr. Simons to the executive vice president of the Miami Beach First National Bank.

Mr. Ward: Where are the books and records of this corporation?

The Witness: In the first place, the corporation was dissolved after Mr. Simo[illegible] death.

Where they are now, I do not know. Frankly, to the best of my knowledge—I do not know.

Mr. Ward: Maurice Lombard—who is that?

The Witness: A brother-in-law.

Mr. Ward: Is he down here?

The Witness: I could not recall, offhand.

Mr. Ward: Martha Lombard?

The Witness: That was his sister.

Mr. Ward: Was she down here?

The Witness: I do not recall.

Mr. Ward: In what kind of business were they?

[fol. 319] The Witness: Mrs. Lombard is a housewife. They were not active participants in the Fruit Sales Corporation.

Mr. Ward: Are you in the Fruit Sales business yourself?

The Witness: No. I was busy practicing law at that time, Mr. Ward.

Mr. Ward: The only one here would be Sol Simons?

The Witness: That is correct.

Mr. Ward: Did he have an office here?

The Witness: Yes, 1110 Venetian Way.

Mr. Ward: Did he have a secretary?

The Witness: Yes, sir. He used to—not a hired secretary. He used to hire public stenographers or girls. In fact, sometimes he even used my own secretary on week ends or evenings, and then I know there were other girls he hired.

Mr. Ward: Your Honor, I just think this is immaterial and irrelevant. A corporation of $300, filed in July—they were incorporated back in November. That is through 1951. I do not think that has anything to do with the residence feature down here.

The Court: Overruled. It will be Defendant's Exhibit H.

[fol. 320] [The document refefred to was thereupon marked "Defendant's Exhibit H."]

By Mr. Sibley:

Q. Mr. Liebman, let me ask you this: Did you file the suit for Sol Simons against Lucy C. Simons in the Circuit Court of the Eleventh Judicial Circuit?

A. I did, sir.

Q. The proceedings are reflected by Plaintiff's Exhibit No. 3, which is the original file. Is that correct?

A. Yes, sir.

Q. Here is a photostat of the docket sheet, Case No. 148091.

A. Yes, sir.

Q. After you had procured the final decree of divorce reflected by that file, did you procure from the Clerk a certified copy of the decree of divorce?

A. Yes, sir.

Q. How many copies do you recall you received?

A. Several. I do not remember whether it was three, four or five. But I know it was several.

Q. After you received and procured photostatic copies of the final decree, what did you do in relation to the plaintiff here, Lucy Simons?

A. I mailed her a certified copy.

[fol. 321] Q. I notice that certified copies were procured on May 2, 1952. You mailed it to her after that date?

A. My recollection would be the same date I obtained it.

Q. Do you recall where you mailed it to her? Do you recall her address?

A. The same address to which Mr. Simons was mailing checks, and it was in the 70's, either Hotel Beacon or some address in the 70's. I do not remember just when she moved.

I know there was one time she lived in the Hotel Beacon. I know that was her address at the time of the commencement of the lawsuit.

I know the address to which I mailed the certified copy of the decree was the same address that Mr. Simons was sending the alimony checks.

Q. Did you get any response to that letter enclosing the decree?

A. No, sir.

Q. Did you write a letter, or did you just enclose the decree?

A. I just enclosed the decree.

Q. After Mr. Simons returned some time around March 17, 1952, do you know whether or not he remained in Dade [fol. 322] County, Florida until the time of the final hearing for divorce?

A. Yes, sir.

Q. After the decree was rendered, did he remain in Dade County, Florida thereafter?

A. He remained for a period. Then he went out, and he would be coming back and forth.

The nature of his business was such—he was in the fruit business, and he would fly to Washington, to Louisiana, up in New York State, depending upon the time of the year and the particular fruit.

I know he went to Holland. He went to Switzerland to buy apples and grapes and other things.

But he would always come back here.

Q. You are talking about Dade County, Florida?

A. Yes, Dade County, Florida.

Mr. Sibley: You may inquire.

Cross examination.

By Mr. Ward:

Q. What do you mean, Mr. Liebman, he always came back?

A. I am sorry. I cannot hear.

Q. What do you mean he always came back to Dade County, Florida?

A. Well, to use the vernacular, this was his roosting [fol. 323] place. This was his home.

Q. Did you ever visit him in New York City?

A. No. He visited me in New York. I did not visit him. I presume you mean from 1951 on?

Q. Have you ever visited with him in New York? You came here in 1950?

A. Before 1950.

Yes, I visited him.

Q. Out here on Venetian Way?

A. On Venetian Way.

Q. Did you visit him in New York at his residence up there?

A. Before I moved here, yes, sir.

Q. Did he carry on a business in New York?

A. Yes, sir.

Q. Did he carry on that business in the apartment on Yellowstone Boulevard?

A. The best of my knowledge, he did.

Q. When you came here in 1950, he was still operating up there, was he not?

A. The best of my knowledge, yes.

Q. The first time that you had any contact with him about the establishment of residence in Florida was some time around October, November, 1951?

[fol. 324] A. That is correct, sir.

Q. Had you seen Mr. Simons between the time you let New York to the time you got down here in the fall of 1951?

A. I think I saw him once or twice.

Q. Where?

A. Here in Florida.

Q. Was it not his custom to come down here to Florida every year?

A. No. I could not say that was his custom, sir.

I know one time where he came down here for a day, because there was a man from Chicago in the wine business.

You see, he had different kinds of businesses. In certain businesses he acted as broker. In certain businesses he acted as an independent principal, and he came down here one time before November, 1951, to meet a certain gentleman from Chicago, and he was interested in the man, or the man was interested in purchasing a lot of carloads of grapes. He was in the wine business.

Q. Do you know anything about his business that was conducted here? I know you were a member of this corporation.

Did you have anything to do with this Fruit Sales [fol. 325] Corporation?

A. Well, I know what he told me.

Did I have anything to do other than in a legal capacity? No. I had no intimate affairs except that he would tell me that Fruit Sales Corporation made so many thousands of dollars this year or that Fruit Sales has so much of a deposit.

Q. Did you ever actually see any billing, any billheads or bills of lading or any other papers or advertising data where the words "Fruit Sales, Inc., a Florida corporation" was ever used?

A. I would say I have seen something with the name "Fruit Sales Corporation" other than the corporate papers.

He did not advertise. He did not advertise in any one of his businesses. The nature of his business was such—it was a personal relations business.

Q. I hand you a letter which is Defendant's Exhibit C dated February 4, 1952, from Sol Simons, 69-10 Yellowstone Boulevard, Forest Hills, Long Island, New York, and ask you if you will note that.

Did you ever see anything similar to that letterhead where the words "Fruit Sales, Miami, Florida," was ever used?

A. No. As well as I recall, the only thing I saw was some [fol. 326] bills, invoices with Fruit Sales. I never saw any

stationery, "Fruit Sales." But I had seen invoices with Fruit Sales on it.

Q. Where were they handled? Were they mailed to you, or how did you know about them?

A. It was in connection with some legal aspect of it. He brought them to my office. That is how.

Q. Did you ever see any income tax returns for Fruit Sales?

A. No, sir, not that I recall.

Q. Did you ever attend any board meetings of Fruit Sales?

A. I prepared the minutes of the meetings.

Q. Did you ever actually have a meeting in the ten years in that corporation?

A. Let me say that the first meeting I am absolutely positive of, because that was in my own office. Pardon me if I sound a little conceited, but I attempted to make sure that all the provisions of the law were provided, and the preparation of the minutes of the first meeting of stockholders and directors, and the election of directors—thereafter, for two or three years, at least, I am sure that these pro forma minutes were conducted.

Whether I continued right through until 1959 or not, I couldn't say. But there were annual meetings in con-
[fol. 327] nection with the law, and they were held.

Q. When was the first time, if at all, you ever procured an occupational license of Dade County and the State of Florida and for Miami Beach?

A. For myself?

Q. No, for this corporation.

A. I do not remember.

Q. Is it a fact that there never was an occupational license taken out here?

A. Mr. Ward, I could not answer that. I do not know.

Q. Did you handle his personal financial affairs here?

A. You would have to be a little bit more explicit.

Q. Did you ever prepare an intangible tax return?

A. No. I did not prepare any of his tax returns. He had an accountant who prepared all of his tax returns.

Q. You could not say yourself whether he did or did not ever prepare the intangible tax return?

A. To the best of my recollection, they were prepared. I would be surprised if they were not, because I am quite sure I must have told him, instructed him, what the law was, and I know the man he used for an accountant, and [fol. 328] he had a good accountant. I have a great deal of respect for the man.

Q. Did you ever discuss with him about voting down here, whether he was a registered voter?

A. Yes. We discussed the elections and voting.

Q. The first steps you carried on were the creation of domicile in November, November 17 or 19. He took a lease for one year on an apartment, and you filed Declaration of Domicile?

A. That is right.

He opened a bank account. I discussed with him all the things that were necessary for him, that he would have to do if he were going to be a resident of Florida.

He had come down here in November, 1951, without his automobile. He was very tired at the time, and he did not drive down.

I told him when he brought his car down what he would have to do. They would have to change the registration to Florida.

Voting—there was always a difference of opinion between Mr. Simons and myself politically. I told him what he should do. He was repugnant to that. He was a Republican, so I did not care whether he voted or not. I am sorry.

[fol. 329] Q. Other than filing this return and taking this lease, was there anything actually Mr. Simons did more than just come down here and leave again?

A. He lived here. He ate here. I saw him. He visited with people. He came up to my office. We would go out to dinner toget[illegible] He was at my home.

Q. Did you know he still maintained his residence, or whatever you might call it, up in Forest Hills?

A. I had discussed that address on Yellowstone Boulevard. He had a lease on that place, and I told him that in my opinion, the best thing for him to do was to dispose of that.

I said that there never would be any question about the question of residency and the question of domicile in par-

ticular, and I know that he had secured some time in early '52, before this decree was obtained, permission to sublet this apartment.

Q. But he never did it, did he?

A. No. He did not go through with it.

Q. Do you know why?

A. Well, it was his contention that, number one, he was using this exclusively as a business office, and he asked me whether he had the right to maintain business offices outside of the State of Florida, and I told him, in my opinion, he did have a right to maintain business offices [fol. 330] out of the State of Florida.

He explained to me that this was a business that he built up, and having known Mrs. Simons for many years, I know of the problems and vicissitudes to build up this business, and he said that since he used to shoot over to Europe, it was cheaper for him to maintain this apartment than to have to rent hotel quarters every time he went through going up to New York State, where he went a great deal to buy grapes.

This was his business headquarters when he was in the northern part of the country, and I said my opinion was that as long as it was not used as a residence, but used primarily as business headquarters and business office, that I could not see anything objectionable to

The fact even that he slept there—but sleeping was incidental to his business.

Q. Do you not know he maintained a housekeeper and a maid there on full-time services?

A. I did not know, but I would not be surprised.

Q. Did he do that in Miami?

A. Yes. He had maid service here.

Q. Did he have a permanent maid and a permanent housekeeper here?

A. I am not sure what the arrangement was.

[fol. 331] Q. Do you know one way or the other?

A. I know Mr. Simons would not clean the apartment, Mr. Ward. He had someone to do it.

Q. Was this a small efficiency apartment that he had over there?

A. No. It was what we call a one-bedroom apartment. It was not an efficiency. It had a large combination—I would say it was almost the size—no, a little larger than this room.

Q. Did he furnish it himself?

A. No. There were certain basic things. He took it as a furnished apartment basically and added certain things to it himself.

Q. I notice this says a furnished apartment [indicating].

A. Right.

Q. They furnished maid service. Do you know in addition to that whether he had any secretary that stayed here with him, either male or female, who worked with him or lived in the apartment whenever he worked here?

A. No. As far as I know, he never had any permanent secretary.

In all the years that I—Mr. Simons was able to do his own typing. He was able to do his own billing. He would accumulate a number of letters. Then he would hire some-
[fol. 332] body by the day or three or four days to come in and clean up his work.

He never, in all the years I knew him, ever had any permanent secretary.

Q. You were testifying with reference to the contents of Case No. 148091.

Were you representing the parties, Mr. Liebman, on the thirtieth day of April, 1952, when the final decree was presented, when it was before the Court on the bill of complaint and the defendant's answer. Do you recall that?

A. Let me see the paper. I mean, everything in that file that has my name on the bottom—

Q. Your name is not on that particular decree.

A. My name is here, sir [indicating]. Here is my name [indicating].

Q. I mean, you did not sign it?

A. I have not had the honor of being a Judge in Circuit Court. Judge Hawthorne signed this.

Q. How do you explain the caption, the above and foregoing cause coming on to be heard this day before the above-styled Court upon the bill of complaint filed herein and the defendant's answer?

A. With all due apologies, sir, I must have done what I—I am not blaming anybody else, but in my profession, [fol. 333] I had a form in front of me, and I was dictating, and that is the only possible explanation I can have for having done that, because there was no defendant's answer.

Mr. Ward: No other questions.
Mr. Sibley: Come down.

[Witness excused]

The Court: 9:30 tomorrow morning.

[Thereupon the hearing adjourned until Tuesday, October 23, 1962, at 9:30 o'clock a.m.].

[fol. 334] October 23, 1962.

The above-entitled cause came on for further hearing before Hon. John J. Kehoe, Judge, pursuant to adjournment.

Appearances: As heretofore noted.

[fol. 335] The Court: Are you ready?
Mr. Sibley: Yes, sir, we are ready.

The Court: Call your next witness.
Mr. Sibley: Mr. Wasserman.

Thereupon: SIDNEY WASSERMAN was called as a witness on behalf of the defendant and, after having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Sibley:

Q. Please state your name.
A. Sidney Wasserman.
Q. Where do you reside?
A. 1440 West 21st Street, Miami Beach.
Q. How long have you been a resident of Dade County, Florida?
A. Since 1938.

Q. What is your occupation or profession?

A. I am a certified public accountant.

Q. When were you licensed under the laws of the State of Florida?

Mr. Ward: We will admit Mr. Wasserman's qualifications.

Mr. Sibley: Let the record show the qualifications are [fol. 336] admitted by the plaintiff or conceded.

By Mr. Sibley:

Q. Mr. Wasserman, did you know Mr. Sol Simons?

A. Yes, I did.

Q. Do you have any recollection of when you met him?

A. Yes. It was November of 1951. He walked into my office.

Q. What was the purpose of his visit, did he say?

A. Yes. He came into my office and stated he had just formed a Florida corporation. He wanted me to open books for him and tell him how to conduct the bookkeeping end. He told me he was going to be a resident of Dade County. He already rented an apartment at the time he came to see me, and he wanted to know what papers he had to file, and the normal questions.

Q. Did he employ you as an accountant at that time?

A. He did.

Q. How long did you represent him as an accountant?

A. Until he died.

Q. Did you give him any advice as to what was necessary [fol. 337] in order for him to establish his residence in Florida so far as your field of activity was concerned?

A. Yes, sir.

Q. What did he do in pursuance of that advice?

A. Well, he left me papers, his Declaration of Domicile.

Q. We have that.

A. He left me a copy of it. I didn't prepare it for him.

Q. All right.

A. He started to file his Federal Income Tax Returns—at that time not the Federal Income Tax Return, but the Estimated Return for 1952. He started to file in Jackson-

ville, and subsequently filed his 1952 return and all subsequent returns in Jacksonville.

Q. Did you make or inspect the returns before they were filed?

A. I didn't make them. I inspected them, and I filed them.

Q. Do you have copies between your file and my file? Can you dig out copies of all the returns you made for him in the Jacksonville District as a resident of Florida?

A. I think so.

Here is '52, '53, '54. I cannot seem to find '58, but every [fol. 338] other one is here from 1952 to 1957. I don't find the 1958 return. It may be here.

Yes, 1958 is here, also.

Q. Will you take 1958 out so I will have the entire returns filed by him for 1952 through 1960, until the time of his death?

A. I have them.

Q. Mr. Wasserman, you have handed me the income tax returns of Sol Simons for 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959 and 1960. I will ask you, did you file each of these returns for your client, Mr. Sol Simons?

A. I filed each one of those returns.

Mr. Sibley: We tender the returns.

Mr. Ward: May I ask a question?

The Court: Yes.

Mr. Ward: Mr. Wasserman, where is the 1951 return?

The Witness: I didn't file the 1951 return for him.

Mr. Ward: Do you know where the 1951 return was prepared or filed, that would have been filed on or about March 15, 1952?

The Witness: That is right. The '52 return discloses at the bottom it was filed in the Third District in New York. [fol. 339] Mr. Ward: I want to hand you this 1952 return. See if you can tell me anywhere on those returns as to the date they were signed or filed.

The Witness: No, sir, I cannot.

I am assuming this was filed before its due date, which, at that time, was March 15, 1952.

Mr. Ward: On that particular report, on the inside, there is a pencil notation or ink notation prepared by someone in New York City.

The Witness: My handwriting. I wrote it down.

Mr. Ward: You did not prepare any of the data?

The Witness: I didn't prepare any of it.

Mr. Ward: His books and records were not kept here, were they?

The Witness: I don't know whether they were kept here or not.

Mr. Ward: It says prepared by I. H. Finkelstein, Michaelson & Kraft, One Madison Avenue. I assume that is New York.

The Witness: Yes.

Mr. Ward: I notice on one of these sheets here—I will not bother to separate them, but it is this one [indicating]. So we can identify what these things are, this is the statement of operation, 1952, provision for legal and accounting, $4,200.

[fol. 340] Was that paid to you here, or was that paid to the New York auditors?

The Witness: It wasn't paid to me, and I don't know whether it was all auditing fees and accounting.

Mr. Ward: I notice there he paid a business occupational tax in the State of Florida for about $1,546.

The Witness: But that was for the year before.

Mr. Ward: That was for the year 1951?

The Witness: That was for the year 1951.

Mr. Ward: That return was filed when?

The Witness: This return was filed 1952 or 1953—March 15, 1953.

Mr. Ward: Are you correct? Is that not 1952?

The Witness: No.

Mr. Ward: How can you determine that?

The Witness: Mr. Ward, the tax you referred to was due in the State of New York in the year following the four-month period, April 15, following the year in which the business was done.

Now, the 1951 business tax would be due, then, by April 15, 1952. But he couldn't deduct it from his federal tax until he paid it.

Mr. Ward: You mean the occupational tax in New York is paid a year after he has operated?

The Witness: Yes. It is peculiar. Yes. It is right in [fol. 341] front, Mr. Ward.

Do you see how that is broken down with income tax and occupational tax? You find them both on his '52 return in different categories.

Mr. Ward: Has this been put in evidence?

Mr. Sibley: No, but we will put it in.

Mr. Ward: Why not put it in at the same time?

Mr. Sibley: I will have the witness explain what this is first.

Mr. Ward: I think it has been identified, and for whatever they may be worth, they can go in. I will argue them later. It is sufficient for identification.

By Mr. Sibley:

Q. Tell us about the return there [indicating].

A. This is a New York State resident income tax return for the year 1951, which was due April 15, 1952. I assume it was paid by that time.

Included with the normal income tax return is what they have called in New York State unincorporated business tax, as well as an income tax, and as these are paid, they are deducted from the Federal Income Tax Return.

Mr. Ward: Are there any prorations there for, let us say, ten months of 1951?

The Witness: No, sir. This is the tax for the year.

[fol. 342] Mr. Ward: That is all.

I have no objection to the admission, Your Honor. I want to cross examine later. I think it would be more proper then.

The Court: Do you have the 1951?

Mr. Sibley: Yes, New York State for 1951, and the Federal thereafter.

The Court: The New York State tax return will be marked Defendant's Exhibit I.

[The document referred to was thereupon marked "Defendant's Exhibit I."]

The Court: The Federal Tax Returns for the years 1952 through 1960, both inclusive, will be marked Exhibit J.

[The documents referred to were thereupon marked "Defendant's Exhibit J."]

By Mr. Sibley:

Q. Now, after 1951, were there any deductions made on these Federal Income Tax Returns from 1952 to 1960, save the one you have already adverted to for the New York tax?

A. I had better look,

1952, of course, there was a deduction for the 1951 tax.

There was no deduction in 1953 either for income tax or the unincorporated business tax.

[fol. 343] Q. That would be for the year 1952 in New York?

A. That's right.

Q. From there on out, see if there were any deductions made in the Federal tax for the New York tax.

Mr. Ward: It might save time if he will say whether there were any for Florida or New York.

Mr. Sibley: Florida has no income tax.

Mr. Ward: Florida has an occupational license tax.

The Witness: There is an item here starting in 1954-55 called New York State taxes, the exact same amount. I don't know why it was taken off twice, but my understanding was there was an adjustment for periods of tax.

There is nothing in 1956, nothing in 1957, none in 1958, none in 1959, and none in 1960.

By Mr. Sibley:

Q. Will you examine them and see if there are any taxes paid in Florida, deducted for 1952 on through for intangible personal property.

A. There is nothing in 1952. There is a deduction in '53 for $144.

There is a deduction in 1954 of $131.

We have two copies of 1954. It was in there twice.

Now I need the 1955 return. I don't have the 1955 return,

[fol. 344] Mr. Sibley. It may be in your papers.

Q. I do not have the 1955. You do not have it?
A. I don't have it.

Mr. Sibley: Your Honor, there is a duplication in the exhibits, and I ask to withdraw one copy of it.
The Court: All right.
Mr. Sibley: We need the year 1955.
Mr. Levenson: We have 1955.
Mr. Ward: Just substitute that.
Mr. Sibley: Yes, substitute that, with Your Honor's permission.
The Court: All right.

By Mr. Sibley:

Q. All right, sir.
A. 1955, $202.93; 1956, $206.41; 1957, $560; 1958, $277; 1959, $1,228; 1960—no payment in 1960.
Q. There is one other question I will ask you.
I tender you again Defendant's Exhibit J, which are the income tax returns, copies of which have been identified. Can you tell from these what deduction was made for office expense and for what location in New York against Mr. Simons' business?
A. From these, it is impossible to tell a deduction was made for rent. From examinations made by the Internal Revenue people, he deducted all of his New York apart-
[fol. 345] ment and part of Florida.
Q. What amount of his New York apartment did he deduct as a business expense?
A. 1952, $1,714.
Q. What part of his apartment in Florida did he deduct? You say fifty per cent or a part?
A. Much less than fifty per cent. It is about $200, $250.
On this year [indicating], he deducted just New York.
Q. Can you find it? What deduction was made?
A. No. I can't find it, because I don't have his work papers here.
Q. You say there was an examination of these returns by the Federal Government?

A. Twice.

Q. Did you handle that?

A. I handled the first one and Smith handled the second one.

Q. Was this item of New York apartment involved in the investigation?

A. It was.

Q. State whether or not the government allowed that deduction as a business expense.

A. Well, they allowed the bulk of it. There was a dis-
[fol. 346] allowance. I have their report, but they don't make it clear.

The 1958 return, in the year I handled it, they allowed all that was claimed. There was a "No change report."

In the subsequent examination, which was for the years 1958, 1959 and 1960—in 1958, of a total of $1,831, they charged for rent, which included all of New York and part of Florida, they disallowed $590.

Mr. Sibley: You may inquire.

Cross examination.

By Mr. Ward:

Q. Mr. Wasserman, do you have any idea of the rental payments under the lease of the New York apartment?

A. No. I think it was $1,500. I am not certain. I have no documentary evidence of it.

Q. Mr. Wasserman, I hand you the 1951 New York State income tax return and ask you if you have, in conjunction with this tax, the comparable Federal Tax for 1951.

A. For 1951, I do not.

Q. Have you ever had occasion to check that to see whether the items correspond as far as deductions are concerned?

A. No, sir.

[fol. 347] Q. There is an item here on the New York tax of automobile expenses for use in New York and vicinity $1,394.76.

Do you find any proration there at any point?

A. I don't know. I haven't seen the 1951 Federal Tax.

This is supposed to be his entire business, if he does business out of New York. They are allowed prorations where income comes from other places. He has traveling expenses from the whole country.

Q. Do you find any item in there at all which—that is, in the 1951 New York tax return—any item that purports to relate to any activities in Florida?

A. I see nothing except that vague traveling expense.

Q. Do you find anything in there about alimony payments to Lucy Simons?

A. Yes, sir.

Q. What is that amount?

A. $4,800.

Q. As per court decree?

A. As per court decree.

Q. May I see that, please.

With reference to the intangible tax, I believe you testi- [fol. 348] fied that he did not file any intangible tax return in Florida for 1951 or 1952.

A. I didn't hear you.

Q. I think you testified that you could not find any intangible tax payments made to the State of Florida for 1951 or 1952.

A. I testified as to 1952. I don't know anything about 1951.

Q. Do you know any reason why he did not file an intangible tax return on or before April 1, 1952, with the Tax Assessor of Dade County, Florida?

A. Yes. I think that was on my advice, that when he paid an income tax to another state, as a normal thing, the Dade County Tax Assessor would not assess him the intangible tax here.

We filed the first intangible in 1953, also on my advice, because at that time, in 1952, when the return was going to be filed in Jacksonville, and the Dade County Tax Assessor certainly would see it, he would be picked up in any case.

Q. This tax is due under the Florida law, is it not, as of January 1 of each year in advance?

A. Yes.

Q. I do not quite get your explanation as to why he did

not file an intangible tax return in Florida as of January 1, [fol. 349] 1952.

A. Because the possibilities were that he would never have to pay for 1952, which is exactly what happened.

The intangible filing in this state, in this county, is generally noted for the fact that it is not filed—at least fifty per cent of them are not filed, in my personal experience, or insisted upon by the assessor, whether they are due or not.

Q. You had filed or had seen the filing of the Declaration that he was to become a citizen. That was filed December 10, 1951, I believe.

A. Yes.

Q. So, you have no other reason for him not filing an intangible tax in Florida for 1951?

A. Except the dual reason, number one, he was paying an income tax in New York State.

Q. For what year?

A. He was paying it in 1952 for 1951.

Q. Was he paying the income tax in New York State for the calendar year 1952?

A. No, sir.

Q. On any of these figures, going through the return for 1953, did you find any deductions for any occupational [fol. 350] license tax for the City of Miami Beach or the County of Dade?

A. They were not so described, Mr. Ward. I can't tell. They would say license tax, or some of them did have a $25 tax there in the later years.

Q. Do you know of your own knowledge whether Mr. Simons ever had a bookkeeper or a stenographer or carried files or kept files and records at his apartment over here in Miami Beach?

A. I know of my own knowledge, one, that he didn't have a bookkeeper here. I do know that he employed a public stenographer to do some business here.

I do know he kept records, because I was in the apartment for one reason or another, and I saw files there, and, as a matter of fact, I think we hunted for something in there one time. This must have been about '56 or '57.

Q. Let us go to the period, if we can, of the fall of 1951 and the spring of 1952. Do you recall whether he had any books or records?

A. I was never there at that time.

Q. When was the first time you ever went over there?

A. About '56 or '57.

Q. You do not know anything about what he did between 1951 and 1956?

[fol. 351] A. You mean as far as his apartment was concerned?

Q. That is right.

A. Except he paid rent and lived there.

Q. How do you know he lived there?

A. I have called him there.

Q. On how many occasions?

A. I would say at least twice a year.

Q. Did you ever call him in New York City?

A. Yes, sir.

Q. More often than Miami Beach, was it not?

A. No, sir.

Q. Did you have any correspondence with him in New York City?

A. Yes, sir.

Q. Did you ever see any stationery by Mr. Simons for his business other than the one from New York City?

A. Yes, sir. I may have a letter from him here. I am not sure.

No. I didn't bring it with me.

Q. There has been some kind of a corporation setup that has been mentioned here by the name of Fruit Sales Corporation, Inc., filed on the twentieth day of November, 1951. That is Defendant's Exhibit H.

[fol. 352] Did you have anything to do with that corporation?

A. I wrote up the books for this corporation. I filed these income tax returns for the corporation until—I prepared the books for this corporation. I prepared and filed the income tax returns for this corporation from the first one until it was liquidated after his death.

Q. When was the first time you filed any income tax return for this corporation?

A. For the fiscal year ended 1952.

Q. What would be that fiscal year?

A. Either October 31 or November 30.

Q. Did you file the return on July 7, 1952, showing there was $300 invested in this corporation?

A. July 7? I don't know anything about that.

Q. Did you prepare it and file it?

A. You say there is a return in here?

Q. I can point it out for you, sir. It is attached right after the articles of incorporation—the corporate report and tax return filed July 21, 1952, signed by Sol Simons and Seymour Liebman, which shows $300 total outstanding capital stock.

Did you prepare that return?

A. I prepared this return, yes. My wife notarized the signature.

[fol. 353] Q. He was not doing very much business with a $300 corporation on your returns.

A. They did all right.

Q. Did that corporation ever have an occupational license tax?

A. I don't know. I don't have the files with me, Mr. Ward.

Q. When did that corporation start doing business down here, to the best of your knowledge?

A. This corporation did business all over the country.

Q. When did it start?

A. It started right after it was incorporated. We filed an income tax return for it in the first year of its incorporation.

Q. Do you have any personal knowledge as to when it started, when Mr. Simons started doing business in this corporation?

A. Sitting here, no. I have files in my office that would reveal that.

Q. If he was running the rest of his business out of New York City—I say if he was—would he be running that one, too?

A. He might have been.

Q. You have no knowledge that they had any office here
[fol. 354] on any work here or secretarial books?

A. Books I have.

Q. You have the books?

A. The books were in my office.

Q. Did you ever engage, you or Mr. Liebman, in any actual sales or operation of the business?

A. I don't understand, Mr. Ward.

Q. How do you know he did any business here in Florida in this corporation?

A. I didn't say he did business here in Florida. All I know is he brought me the check book and the deposit book and the bills, and we wrote them up and filed an income tax return.

Q. Did you ever go to his place of residence in New York City?

A. No, sir.

Q. I may have asked you this, Mr. Wasserman, but I want to be clear: At any time from 1951 up through the date of his death in 1960, did you actually prepare any of the data that went into any of these returns?

A. No, sir.

Q. It was all prepared by some accountant or somebody probably in New York?

A. That's right.

Q. Did you handle the transfer with the Internal Rev-
[fol. 355] enue Service when he changed his filing location from New York?

A. I did.

Q. When did you first make application to the Internal Revenue Service for permission to transfer?

A. It is not necessary to make application.

What we did, in 1952, since he was going to file his 1952 return in Jacksonville, at the same time that the income tax return was prepared, an estimate for 1952 was prepared. In the 1952 estimate, a check was mailed to the Jacksonville office with the 1951 return, because the estimated payments had already been filed in New York during 1951. It would cause less confusion to file the '51 return in New York. So, that is the way we handled it.

From then on, I mailed or my office mailed each estimate and each tax return for him.

Q. Was that mailed to you from New York auditors and then came to your office, and you, in turn, mailed it?

A. It was mailed to me directly from Mr. Simons. But from there on, yes.

Q. You never actually had him come into your office here and had you prepare the return, sign it, and then you forward it?

A. No, sir.

Mr. Ward: That is all.

[fol. 356] Redirect examination.

By Mr. Sibley:

Q. He did in connection with your return of the Florida Fruit Corporation?

A. Oh, yes. We prepared that one all the way through.

Q. As I understand your testimony—Mr. Ward said had you ever been to the residence of Mr. Simons in New York. I believe you testified that the income tax returns reflect that was a business office. Is that correct?

A. That's right.

Q. Did you make his intangible personal property tax returns for him?

A. I did.

Q. They were filed under your advice?

A. That's right.

Q. And for the years for which they were filed?

A. That's right.

Mr. Sibley: We would like to tender in evidence the certificate of the Dade County Tax Collector in reference to that intangible personal property tax payment.

Mr. Ward: I have no objection to that. On rebuttal we want to file the ones for 1951 and 1952.

Mr. Sibley: It shows the 1952 was not filed.

[fol. 357] The Court: It will be received as Defendant's Exhibit K.

[The document referred to was thereupon marked "Defendant's Exhibit K."]

Mr. Sibley: That is all. Mr. Wasserman.

[Witness excused]

Thereupon: SYLVIA SHERMAN was called as a witness on behalf of the defendant and, after having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Sibley:

Q. Will you kindly state your name.

A. My name is Sylvia Sherman.

Q. Where do you reside, Mrs. Sherman?

A. 18891 Northeast 20th Court.

Q. How long have you been a resident of Dade County, Florida?

A. Almost twenty-one years.

Q. Mrs. Sherman, do you remember having met Mr. Sol Simons?

A. Yes, I do.

Q. Can you place the year that you met him?

A. I would say it's about ten years ago.

[fol. 358] Q. What were the circumstances under which you became acquainted with Mr. Simons?

A. He needed a secretary to do some secretarial work while he was residing in Miami, and he had heard of me and phoned me.

Q. Did you do any secretarial work for him at the time he called you?

A. Yes, I did.

Q. How was your course of procedure? If he dictated a letter to you, we will say, on March 19, 1952, when would you write that letter up in the general course with him?

A. I would usually write it up that afternoon when I got home.

Q. That correspondence would bear the date at which it was dictated to you?

A. Dictated, yes.

Q. I am going to hand you correspondence. Where was this dictation given to you?

A. He lived at the Sandpiper Villas on the Venetian Causeway.

Q. I believe that is 1110 Venetian?

A. That's right.

Q. I am going to hand you some correspondence or copies of correspondence of March 19, 1952, March 20, 1952, March [fol. 359] 29, 1952, March 31, 1952, April 1, 1952, April 26, 1952, April 28, 1952, April 29, 1952, May 1, 1952, and ask you to examine that correspondence and tell me if it was dictated to you and if you wrote the copies of the letters shown there for Mr. Sol Simons on the days indicated on the letters.

Call them out as you go through.

A. Well, March 19, 1952—

Q. Did you write those letters?

A. Yes, I did. Yes. I still have this typewriter.

Q. The date borne there is the date they were dictated to you?

A. Yes.

Q. Go to the next, please.

A. These are all one date.

March 20, I did. These are all mine.

March 29—these are all mine.

March 31 are all mine.

April 1 are all mine.

April 26 are mine.

April 28 are mine.

April 29 are mine.

May 1 are mine.

Q. That is each for the year 1952, each of the dates you [fol. 360] have indicated?

A. Yes.

Q. Where you when you were given the dictation for these letters by Mr. Simons?

A. I was at Mr. Simons' apartment.

Q. On the dates indicated in the letters?

A. Yes.

Q. Aside from the fact that you say you recognized the typewriter which you still have—

A. Yes.

Q. [Continuing] —what else about the letters—

A. I even recognize some of the wording. He was a very brilliant man, and he wrote beautiful letters, and I rec-

ognize my initial. I recognized it. I remember it. I remember the names.

Mr. Sibley: Do you want to examine these?

Mr. Ward: Just one or two questions, primarily on one of them.

Mr. Sibley: Let me tie this in.

Mr. Ward: Go ahead.

By Mr. Sibley:

Q. Were you paid for your services?

A. Yes, I was.

Mr. Sibley: Mr. Ward, we do not have the original checks. We just have some of the photostats from the bank, [fol. 361] and we can identify them.

Mr. Levenson: They were microfilmed and the originals destroyed.

Mr. Sibley: Showing the payments made to her during that month.

By Mr. Sibley:

Q. You were paid for your services?

A. Yes, I was.

Q. These photostats of checks given to you by Mr. Simons, do you recall them?

A. Yes.

Q. Those were for services rendered by you for stenographic work during March, 1952?

A. Yes.

Mr. Sibley: We would like to tender in evidence, if Your Honor please, the photostats, the microfilm, of the checks.

Mr. Ward said he had no objection, as I understand it. Is that correct, Mr. Ward?

Mr. Ward: I have no objection.

The Court: Without objection, they will be marked Defendant's Exhibit L.

[The documents referred to were thereupon marked "Defendant's Exhibit L."]

[fol. 362] Mr. Sibley: You may inquire.

Cross examination.

By Mr. Ward:

Q. Mrs. Sherman—is that your name?

A. Yes.

Q. The correspondence seems to start here with March 19, 1952. Is that your first recollection of when you were employed by Mr. Simons?

A. I can remember it, because I know when my second child was born. It was about a year after that, and he is almost nine.

Q. I hand you a letter dated March 11, 1952 from Old Virginia Packing Company directed to Mr. Sol Simons, 69-10 Yellowstone Boulevard, Forest Hills, Long Island, New York, and ask you if you will note that letter.

A. Well?

Q. In conjunction therewith, I will ask you, so the record will have it, to state whether that letter is stapled to a reply letter.

A. Yes, it is.

Q. The reply letter was dated what date?

A. March 19.

Q. Is it not a fact that the first letter or the first sentence of that letter is: "Dear Nelville: The delay in replying to [fol. 363] your letter of March 11 was because I was so long en route in arriving in Florida."

Do you know of your own knowledge where Mr. Simons had been prior to March 19, 1952?

A. I really can't remember dates. But I do know that he was residing at the Sandpiper Villas, because I would very often call him, and sometimes if there was a very short note, he might dictate it to me on the phone.

Q. That is after the 19th?

A. After the 19th?

Q. Yes.

A. When was the Old Virginia letter?

Q. That was received by him, or it went out of Chicago to New York on March 11.

You answered it for him. He said he was sort of delayed, but he was coming to Florida.

Do you actually know anything about the whereabouts or where Mr. Simons lived or resided prior to March 19, which was the first date you worked for him, apparently?

A. Well, I don't know. All I know is that it was his home. That's where he lived.

Mr. Ward: I would like to identify this [indicating]. Have you put these in evidence?

Mr. Sibley: No, but I will, if you wish.

Mr. Ward: I would like to offer this for identification.

[fol. 364] Mr. Sibley: I will put them all in.

Mr. Ward: I want to identify one more.

I would like to have this particular one identified as a plaintiff's exhibit for identification.

Mr. Levenson: We are going to put them all in.

Mr. Rosenberg: I know that.

Mr. Ward: I would like to have that identified.

The Court: The defendant has had these documents identified by the witness preparatory to offering them in evidence. I do not think the plaintiff can now take those papers and offer them in evidence as plaintiff's exhibits.

Mr. Ward: They have not offered them.

Mr. Sibley: I am going to offer them.

The Court: He was submitting them to you prior to offering them, as I understood it.

Mr. Levenson: That is right.

By Mr. Ward:

Q. Mrs. Sherman, I ask you to read this letter of May 1, 1952, directed, apparently, by Mr. Sol Simons to a Mrs. Sadie Miner, 107-26 125th Street, Richmond Hill, Long Island, New York.

Do you recall having written that letter?

A. It's my letter, yes.

Q. Was Mr. Simons here at that time?

[fol. 365] A. Yes.

Q. Do you know how long?

A. I remember this letter.

Q. Do you remember how long he stayed here after that letter was written?

A. I really couldn't say.

Mr. Ward: That would be specially identified as May 1, 1952.

Mr. Levenson: Could you keep all these in the same folders? I notice you are mixing up the folders. You have the May 1 in the wrong folder. Keep them right, because all the folders are dated.

I will get them in order.

Mr. Sibley: If Your Honor pleases, we tender in evidence the folders of correspondence identified by the witness and request they be marked in evidence collectively as Defendant's Exhibit M.

Mr. Ward: No objection.

The Court: The file as identified by the witness will be received in evidence as Defendant's Composite Exhibit M.

[The documents referred to were thereupon marked "Defendant's Composite Exhibit M."]

The Court: Go ahead.

By Mr. Ward:

[fol. 366] Q. I want to ask one more question on cross examination.

Mrs. Sherman, do you remember back to 1952 by any personal recollection of yours other than these letters?

A. There are many things I remember.

Q. Do you remember when Mr. Simons left to go back to New York?

A. I don't know that he left.

Q. You first saw him on March 19, apparently, of 1952. How long did he stay here?

A. Well, all I know is when he would call me. But very often he would call me and dictate a letter. I had some of his stationery at home, and I would even sign for him, you know, sometimes. That is if it was not a very important letter.

Q. Where would he call you from, New York or Chicago?

A. No. He called me from—it was a local call.

Q. Do you have any recollection of having worked for Mr. Simons at any time except between March 19, 1952, and May 1, 1952?

A. I couldn't say.

Q. Did you ever work for him in 1953?

A. '53? It's possible. I don't know.

Q. 1954?

[fol. 367] A. No. I don't believe. I didn't work for him after I expected my baby.

Q. Were you asked to produce any records showing any work done by you for Mr. Simons after May 1, 1952?

A. Records?

Q. Yes.

Where were these files?

A. I don't know. The first I heard of them was when Mr. Levenson called me to appear—asked me if I could appear as a witness.

Q. Did he not ask you to bring any files that you might have had?

A. I don't have any.

Q. Did you keep any copies of these letters yourself?

A. No, I didn't.

Q. When was the last time you ever saw Mr. Sol Simons in person?

A. I saw Mr. Simons, I would say, about six and a half years ago. I can place that because I know—we have movies of him playing with my children and fishing.

Q. That was about six and a half years ago?

A. About six and a half years ago.

Q. Where was he at that time?

[fol. 368] A. He was at the Sandpiper Villas. He was on the dock there.

Q. Was that the only occasion you remember seeing him in the last six and a half years?

A. I might have seen him.

Q. Not what you might have done.

A. It doesn't stand out in my mind, particularly.

Mr. Ward: That is all.

Redirect examination.

By Mr. Sibley:

Q. As I understand it, according to your estimate, about 1955 you visited him at his home at the Sandpiper Villas with your children?

A. Yes.

Q. What were the ages of your children at that time?

A. Well, the little one was about two, and the bigger one was about seven and a half.

Q. You say you have moving pictures of your visit there to his home?

A. Yes.

Mr. Sibley: That is all. Come down.

(Witness excused.)

The Court: We will take a ten-minute break.

[fol. 369] (Thereupon a short recess was taken, after which the following proceedings were had:)

Mr. Levenson: Seymour Liebman is waiting to catch a plane back to Mexico City if he is not needed. May he be excused? We do not need him.

Mr. Sibley: Do you need him?

Mr. Ward: No. I do not think there would be anything for which we need him.

The Court: Call your next witness.

Thereupon: Dorothy Newhoff Cohen was called as a witness on behalf of the defendant and, after having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Sibley:

Q. Will you kindly state your name, please.

A. Dorothy Newhoff Cohen.

Q. Where do you reside, Mrs. Cohen?

A. 959 Bay Drive, Miami Beach.

Q. How long have you been a resident of Dade County, Florida?

A. Twelve years.

Q. Were you ever acquainted with Sol Simons?

[fol. 370] A. Yes, I was.

Q. Do you recall the circumstances under which you became acquainted with him?

A. I did secretarial work for him.

Q. Do you recall the year in which that work was done or the years?

A. I believe it was '51 and '52.

Q. I hand you correspondence dated March 24, 1952, March 25, 1952, March 26, 1952, April 8, 1952, April 11, 1952, April 17, 1952, April 18, 1952, and ask you to examine the copies of the correspondence there and advise me whether or not you are the secretary who typed those copies.

Mr. Ward: May I ask for the first date?

Mr. Sibley: March 24.

By Mr. Sibley:

Q. Call out the dates that you recognize.

A. March 24, 1952.

Q. Did you type those letters on that date?

A. Yes, I did.

Q. What was your practice in connection with handling this work for Mr. Simons?

A. I would go to his apartment, and he would dictate to me. Then I would transcribe on the machine that he had.

[fol. 371] Q. Right there in the apartment?

A. Right there at the apartment.

Q. You have identified March 24. Go through the other dates and tell us if you handled the dictation and prepared those letters on the dates indicated.

A. This is March 25 (indicating).

Q. You took the dictation on that day and drew those letters? The dictation was given to you by Mr. Sol Simons?

A. That's correct.

Q. All right.

A. March 26, 1952.

Q. The same thing applies?

A. The same thing applies. April 8, 1952. That is mine.
Q. They were dictated to you by Mr. Simons?
A. That's correct.
Q. On the date indicated?
A. That's correct.
Q. All right.
A. April 11, 1952. That is mine.
Q. Dictated to you by Mr. Simons?
A. Yes.
Q. In Miami Beach, Florida?
A. Right.
[fol. 372] Q. All right.
A. April 17, 1952. That is correct.
Q. There is one you missed.
A. April 18, 1952. That is correct.
Q. Where was that dictation given to you by Mr. Sol Simons?
A. In his apartment, Sandpiper Villas.
Q. In Dade County, Florida?
A. That's correct.
Q. I tender you a statement for services rendered dated March 26, 1952, directed to Sol Simons, 1110 Venetian Way, Miami Beach, Florida, showing a statement for services from March 24, March 25, March 26, with a "Received Payment" and signed by Dorothy Newhoff, and I ask you if that is your signature on there (indicating).
A. Yes, it is.
Q. That is a statement for the services rendered for the dates indicated?
A. Correct.
Q. To Mr. Sol Simons at the Sandpiper Villas?
A. Right.
Q. I also tender you a statement of April 18, 1952, submitted to Mr. Sol Simons, 1110 Venetian Way, Miami Beach, Florida, for stenographic services dated April 17 and April 18, and I will ask you if that was submitted by [fol. 373] you.
A. Yes, it was.
Q. You received payment for those services?
A. That's correct.

Q. Those services were rendered on those dates at Mr. Simons' apartment?

A. That's correct.

Q. For the dictation given by him to you?

A. Correct.

Q. I tender you also a statement of May 2, 1952, to Mr. Sol Simons, 1110 Venetian Way, Miami Beach, Florida, Re: Will, May 1, 1952, evening, and May 2, and I will ask you if that is a statement submitted by you for services rendered by you to him on the date indicated.

A. Yes. Correct.

Q. Those services were rendered pursuant to his dictation?

A. Right.

Q. At the Sandpiper Villas?

A. Right.

Q. On the dates indicated?

A. Right.

Mr. Ward: No objection.

Mr. Sibley: Your Honor, we tender in evidence as a collective exhibit three statements rendered by the witness to [fol. 374] Mr. Sol Simons, one dated March 26, 1952, one dated April 18, 1952, and one dated May 2, 1952, and request they be marked in evidence as Defendant's Exhibit N.

Mr. Ward: Let me ask just a few questions. I have no objection to those.

The Court: They will be received as Defendant's Composite Exhibit N.

(The documents referred to were thereupon marked "Defendant's Composite Exhibit N.")

Cross examination.

By Mr. Ward:

Q. Mrs. Newhoff—is that your correct name?

A. Mrs. Cohen now.

Q. Mrs. Cohen?

A. Yes. It was Dorothy Newhoff.

Q. I notice that the first folder here is dated March 24, 1952. Did you ever have occasion to work in the apartment along with Mrs. Sherman, who just testified in this case?

A. No.

Q. Was this your first employment by Mr. Simons, March 24, 1952?

A. I'm not too sure.

Q. Can you point to any prior employment by him?

A. I think '51 on some occasion. You see, it was from [fol. 375] time to time that I—

Q. Were you a public stenographer, or were you just working odd jobs?

A. I was a public stenographer, yes.

Q. Where was your place of business?

A. Well, actually, I lived at a hotel, and I just got phone calls.

Q. Can you state whether you have any record or any personal recollection of having worked for Mr. Simons prior to the 24th of March, 1952?

If you do not remember, just say so.

A. I'm not too sure about that.

Q. Do you have any recollection of having worked for him after April 18, 1952?

Mr. Sibley: You have a statement from May 1 and 2.

By Mr. Ward:

Q. After, let us say, around April 30 or May 1, 1952.

A. I don't believe I worked for him after that. I took a permanent position.

I remember his having called me, and I was busy.

Q. Are you sure that this is all of the correspondence or copies of all the correspondence?

A. I am quite sure.

[fol. 376] Q. That you did for him?

A. I am quite sure.

Q. Here is a letter received from—it looks like L. F. Long that seems to be in this correspondence directed to Mr. Sol Simons, April 23, 1952.

First, do you recall the receipt of that letter?

A. This does not look familiar to me.

Q. You do not have any personal recollection of that?

A. No.

Q. Mrs. Cohen, were you personally present on April 17, 1952, when this letter to Louis F. Long was dictated?

A. Yes, I was. I always typed in his apartment.

Q. Did you have any discussion with Mr. Simons on April 17, any time within the next two weeks, about how long he was going to stay in Florida?

A. No.

Q. Do you know of your own knowledge whether he, in addition to Mr. Long, ever offered this apartment for use to his customers?

A. No. I wouldn't remember about it. He didn't discuss that with me.

Q. The only thing you would know about that is what-

[fol. 377] ever was dictated in the letter of the 17th?

A. That's right.

Mr. Ward: That is all.

Your Honor, we have not had a chance to go through all of these. I do not want to hold it up at this time.

Mr. Sibley: If Your Honor please, the defendant tenders in evidence the folders of correspondence identified by the witness.

I will try to get them in appropriate order.

March 24, 1952, March 25, 1952, March 26, 1952, April 8, 1952, April 11, 1952, April 17, 1952 and April 18, 1952.

The Court: They will be received as Defendant's Composite Exhibit O.

(The documents referred to were thereupon marked "Defendant's Composite Exhibit O.")

Mr. Ward: No other questions.

Mr. Sibley: Thank you very much.

(Witness excused.)

Mr. Sibley: At this time, if Your Honor pleases, the defendant tenders in evidence the deposition of Edgar A. Mandeville, which was taken on July 5, 1962, and I will ask Mr. Levenson, with the Court's permission, to read the deposition.

[fol. 378] The Court: Go ahead.

Mr. Levenson: Starting on page 3.

"Q. Will you state your full name, sir?

"A. Edgar A. Mandeville.

"Q. Where do you reside?

"A. 3314—105th, Corona, Long Island.

"Q. What is your occupation, profession or employment?

"A. Letter carrier.

"Q. You work for the United States—

"The Witness: That's right.

"Q. You are a United States postal employee?

"A. Yes.

"Q. How long have you been so employed?

"A. Twenty-five years.

"Q. What is your route?

"A. Yellowstone Boulevard, Forest Hills.

"Q. Do you deliver the mail to 69-10 Yellowstone Boulevard, Forest Hills, Queens, New York?

"A. Yes.

[fol. 379] "Q. How long have you been delivering the mail to that address?

"A. Since the building was opened. I don't remember the exact date the building was opened.

"Q. Can you give us your best approximation?

"A. I started on that particular route in October of 1939, and the first building was opened at that time across the street. So I presume around 1940 the 69-10 was opened.

"Q. Is that a large apartment house?

"A. 154 families.

"Q. Did you in the course of your employment become acquainted with a man named Sol Simons?

"A. I did.

"Q. How did you become acquainted with him?

"A. Well, as a tenant in the building I knew him, and he got quite a bit of mail. Quite often I would deliver it to his door, because he had so much of it.

[fol. 380] "Q. Now, do you know the nature of Sol Simon's business?

"A. It was food. The exact nature of it, I don't recall, other than the fact that it was something to do with food.

"Q. Well, were you aware of the fact that he as a result of his business moved around a great deal?

"A. Yes.

"Q. Now, when Sol Simons was not present at the premises 69-10 Yellowstone Boulevard, what instructions did he give you in regard to the delivery of his mail?

"A. The mail was either put in the box or I would have given it to Sadie many times, Sadie Miner.

"Q. How about registered letters that came in Mr. Simons' absence?

"A. If any came and he was not present, Sadie signed for them or Mrs. Doyle.

"Q. Did you ever upon any occasion deliver any mail addressed to Sol Simons to a night doorman at those prem-
[fol. 381] ises known as Arthur Joseph Meyers?

"A. No.

"Q. When do you take your vacations customarily?

"A. I usually take two or three weeks in March and two weeks in September or October.

"Q. Have you followed that habit—has that become a habit?

"A. That has become a habit.

"Q. Calling your attention to March of 1952, did you take a two- or three-week vacation in that year?

"A. I did.

"Q. Where did you go?

"A. I went to Miami.

"Q. While you were there, did you visit anyone that you had become acquainted with in New York?

"A. Yes, I visited Sol Simons at the address on Venetion Way. I visited him.

"Q. And you personally saw and spoke with him on that occasion?

"A. I did.

[fol. 382] "Q. Can you recollect the exact date when you saw him?

"A. No, I don't remember the exact date. It was some time during the two or three weeks that I was in Miami.

"Q. Did you know if Mr. Simons operated the business that we have previously mentioned from his apartment?

"A. The apartment at 69-10, yes.

"To elaborate on that, his telephone bills were very large. We always made it a joke of what a large telephone bill he had.

"Q. You were quite friendly with Mr. Simons?

"A. Oh, yes.

"Q. Mr. Simons received a large volume of mail, I gather?

"A. He did.

"Q. Did Mr. Simons, when he moved to Florida, instruct you in any way with regard to his mail?

"A. Sometimes I used to forward it to his address at [fol. 383] Venetian Way, and sometimes I would leave it with Sadie, who I presume sent it to him there.

"Q. What was the procedure with regard to registered letters that had to be signed?

"A. Well, he didn't leave any specific instructions, but I know that I would never deliver a registered letter to anyone other than Mr. Simons or the people in his apartment.

"Q. And that would be?

"A. Sadie Miner or Mrs. Doyle.

"Q. Now, in subsequent years after 1952—where did you take your vacation in March of 1953?

"A. In Miami.

"Q. On that occasion did you visit Sol Simons?

"A. I did.

"Q. How about March of 1954?

"A. Yes.

"Q. You took your vacation in Miami?

"A. Yes.

"Q. And you visited Sol Simons?

[fol. 384] "A. I did.

"Q. In 1955, did you do the same thing?

"A. Yes.

"Q. And you saw Sol Simons?

"A. Yes.

"Q. In Miami?

"A. Yes.

"Q. In 1956?

"A. Yes.

"Q. You visited Miami on your vacation and you saw Sol Simons?

"A. I did.

"Q. Now, did you do the same thing in 1957?

"A. I went to Florida each March for the first two or three weeks in March—I don't remember how many weeks I would take, sometimes two weeks or three weeks, but each time I was there I would visit Sol Simons."

Mr. Ward: This is cross examination beginning on page 9.

"Q. You delivered mail to approximately 150 people at [fol. 385] 69-10 Yellowstone Boulevard in the months of October, November, December 1951?

"A. Yes.

"Q. And January, February, March and April of 1952?

"A. January, February and March—

"Q. March and April of 1952?

"A. I just said I was in Miami in March.

"Q. January and February did you deliver mail?

"A. Yes.

"Q. In April and May you delivered mail to those premises?

"A. Yes.

"Q. To 150 different people there?

"A. Yes.

"Q. That is hundreds of letters, is that right?

"A. Yes."

Mr. Ward: That is it.

Mr. Levenson: "Q. Are you still delivering mail to those premises?

[fol. 386] "A. I am."

OFFERS IN EVIDENCE

Mr. Sibley: The defendant, if Your Honor pleases, tenders in evidence a letter identified by Mrs. Lucy Simons and marked for identification by the Court as Defendant's A-3.

Mr. Ward: Let me see it, please.

I have no objection, except I do not think it is material.

The Court: The letter identified by Mrs. Simons on cross examination as being a letter that she had sent to Mr. Simons will be received as Defendant's Exhibit P.

(The document referred to was thereupon marked "Defendant's Exhibit P.")

Mr. Sibley: The defendant, if Your Honor pleases, tenders in evidence as a composite exhibit a letter from Myron J. Greene to Sol Simons, Hotel New Yorker, dated November 19, 1951; a letter from Myron J. Greene to Sol Simons at 1110 Venetian Way, Miami Beach, Florida, dated November 26, 1951; a letter from Myron J. Greene to Sol Simons November 27, 1951, directed to 1110 Venetian Way, Miami Beach. All have been identified as Defendant's Exhibit A-1, A-2 and A-3 by deposition.

Mr. Ward: We have no objection. I thought they had been put in.

Mr. Sibley: You put some of them in.

[fol. 387] The Court: It will be Defendant's Composite Exhibit Q.

[The documents referred to were thereupon marked "Defendant's Composite Exhibit Q."]

Mr. Sibley: The defendant, if Your Honor pleases, tenders in evidence photostat signed by Lucy C. Simons, originally which was signed by Lucy C. Simons, sworn to by Lucy C. Simons, which has been identified by her, filed in the County Judges' Court of Dade County, Florida, "Election to Take Dower." We ask that it be marked in evidence as Defendant's Exhibit R.

Mr. Ward: That is the one that was identified?

Mr. Sibley: That is her signature.

Mr. Ward: We have no objection.

The Court: Defendant's Exhibit R.

[The document referred to was thereupon marked "Defendant's Exhibit R."]

Mr. Sibley: If Your Honor pleases, I tender to Mr. Ward copy of the will of Sol Simons and ask you to inspect it. It is an accurate copy. We have somebody here to testify.

Mr. Ward: I will take your statement for it.

Mr. Sibley: We ask that it be marked in evidence as Defendant's Exhibit S.

The Court: It will be received as Defendant's Exhibit S.

[fol. 388] [The document referred to was thereupon marked "Defendant's Exhibit S."]

Mr. Ward: Mr. Sibley, just one phase of the case. There was an amendment to this dower that was identified in the deposition.

Mr. Sibley: Amendment to what?

Mr. Ward: Amendment to the dower application.

Mr. Levenson: I do not think she identified it.

Mr. Ward: Maybe it was after. We will put it in.

Mr. Levenson: It is unsworn.

Mr. Sibley: May I see that for a moment, if Your Honor please.

The Court: Call your next witness.

Thereupon: Gordon Campbell McLoud was called as a witness on behalf of the defendant and, after having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Sibley:

Q. Please state your name, sir.

A. Gordon Campbell McLoud.

Q. Mr. McLoud, how long have you been a resident of [fol. 389] Dade County, Florida?

A. I have been a resident of Dade County since 1946.

Q. What is your occupation or profession?

A. I am assistant trust officer in the Miami Beach First National Bank.

Q. Which is the defendant in this case?

A. Yes, sir.

Q. As executor, you are familiar with the terms and provisions of the will of Sol Simons, a copy of which has been introduced in evidence as Defendant's Exhibit S. Is that correct?

A. Yes, sir.

Q. Is there a provision of this will which reads as follows: "I have deposited in my vault in the Miami Beach First National Bank a sealed envelope containing a letter. This envelope is marked: 'Re Lucy C. Simons.' In the event the said Lucy C. Simons commences any legal action or proceeding concerning my estate, I direct my Executor to open the envelope and file the letter in the probate proceedings. If she does not commence any action or proceedings as aforesaid, then in that event the envelope shall remain unopened and, upon the discharge of the Executor, shall be destroyed."

That is from Article V, the last paragraph.

[fol. 390] Was there such a letter deposited?

A. Yes, sir.

Q. Is this the letter [indicating]?

A. This looks like the letter that was in the copy with the will.

Q. Were there two letters deposited, identical?

A. Well, now, I don't know whether one was a copy of the original. I know we did have a letter stapled to our pending folder in the estate. Mr. Glen Smith, who is also in this room, handled this estate at the beginning, and when he was recalled to active duty with the service, I took over the handling of the estate.

Q. I am going to tender you Defendant's Exhibit A-2 for identification and another letter which says: Sol Simons, re Lucy C. Simons. Do not open except pursuant to Article V of the will, and ask you did you open both of those letters in the presence of Mr. Levenson and when they were opened.

A. Yes, sir. I opened these—I believe I opened both of these letters at the same time, and it was in the spring of this year, when he came into the bank.

Q. That was after proceeding had been filed by Mrs. Simons?

A. That is correct.

[fol. 391] Mr. Sibley: They are identical, both signed.

Mr. Ward: Have you asked about the contents?

Mr. Levenson: One is a copy.

Mr. Sibley: It was identified by your client as the signature thereon.

Mr. Levenson: They are identical. One is a carbon copy.

Mr. Ward: Does Your Honor want to see one of them? I have an objection to make as to the introduction.

The objection, Your Honor, is that it is not of probative value, number one.

Secondly, it is scandalous and impertinent, and it is a self-serving declaration. There is no legal status as a will or an amendment to the will.

It is contrary to the exhibits which are in evidence, and the factual determinations made by the courts of New York on two occasions.

Under the decision of the Florida courts of record, Rhoades v. Bohn, 114 So. 2d 493, where the issue involved was determined by a court— .

The Court: Just state your objection.

Mr. Ward: On April 2, 1952, the court then having jurisdiction over both of the parties rendered an amended decree consonant with the 1946 decree, when these matters were all res judicata in that court.

[fol. 392] For that reason, we object to the introduction of such a self-serving declaration as that.

Mr. Sibley: If Your Honor pleases, this statement rendered or given by the decedent, in which he instructed that it was not to be opened unless a contest was filed, demonstrates the animus that existed between these parties, which is a material factor in determining whether or not Your Honor believes the jovial meeting between the plaintiff and the decedent, when she said they got along pleasantly, and he told her to destroy the citation.

This directly impeaches that testimony, and I think is admissible for that reason, if not any other.

The Court: The objection will be sustained.

Mr. Sibley: You may step down.

[Witness excused.]

Mr. Sibley: May we have a minute's recess?

The Court:

[Thereupon a short recess was taken, after which the following proceedings were had:]

THE DEFENDANT RESTS

Mr. Sibley: The defendant rests, Your Honor.

Mr. Ward: It may be that we can stipulate on these things.

We have in the pleading file in this case the election to [fol. 393] take dower, which was already identified and was filed as one of the defendant's exhibits.

Part of the procedure is an affidavit of Lucy C. Simons that was filed, part of the notice of hearing and depositions.

Mr. Sibley: You mean this affidavit filed in this proceeding?

Mr. Ward: Yes. It is nothing new. She already testified to it.

Mr. Sibley: This is an affidavit filed in the proceeding. But I object to it upon the ground it is immaterial and irrelevant. It has no probative value and is a self-serving declaration.

This is something she filed in this case.

Mr. Ward: In response to your notice.

The Court: She testified to that, has she not?

Mr. Ward: Yes. I just want to show, Your Honor—there is a question here, Your Honor. There are certain proceedings in the County Judges' Court that we say the County Judge did not have jurisdiction of, and there are copies of the dower and copies of the pleading.

I think it is a part of the pleadings in the case. But I want to be sure that it is considered. I do not think we have to put the entire proceedings of the Probate Court in here, because you have a limited issue in the case.

[fol. 394] I want to put Mrs. Simons back on the stand.

Thereupon: LUCY C. SIMONS was recalled as a witness in her own behalf and, having been previously duly sworn, was examined and testified further as follows:

Direct examination.

By Mr. Ward:

Q. Mrs. Simons, I hand you a letter which you identified. It is now in evidence as Defendant's Exhibit P.

On the rear of that letter, which was dated November 20, 1957, you stated that you tried to call at his home in Forest Hills, but you got no answer.

At the time that you wrote that letter, had you ever been informed by Mr. Simons that he claimed any other home than Forest Hills?

A. No, sir.

Mr. Ward: No further questions.

[Witness excused.]

Mr. Ward: The plaintiff has nothing further. We rest.

Mr. Levenson: Could we see Plaintiff's Exhibit 4?

[fol. 395] Mr. Ward: I do not know what Your Honor's wish would be. We would like to have a short time in which to give a memorandum of the facts. We have not had a chance to examine each and every one of these letters. There are some of them that are quite important, we think, on this question of intent and contract and the second phase of the case.

This is a case which does not involve other divorces granted. The man is dead. It is a question of determination of a property right to an application for dower, and there are about three factors involved in this case, which Mr. Levenson has briefed quite thoroughly.

Perhaps in my own mind it will reduce down pretty close to two or three Florida decisions on this question of dower, but we would like to have a day or two in order to submit a memorandum of our own.

Mr. Sibley: Let me finish with the witness.

Mr. Ward: I beg your pardon.

Mr. Sibley: I just want to ask one question.

Thereupon: Lucy C. Simons was recalled as a witness for cross examination and, having been previously duly sworn, was examined and testified further as follows:

[fol. 396] Cross examination.

By Mr. Sibley:

Q. You were present, Mrs. Simons, in court in New York on January 29, 1952, when your husband testified before

the Honorable David L. Weil, the official referee. Is that right?

A. Yes.

Q. You heard him testify, did you not?

A. Yes.

Q. You heard him testify at that time, in that hearing, that he was a resident of Florida, and his address was 1110 Venetian Way, Miami, Florida. Is that correct?

A. He testified to that, yes.

Q. He did? All right. That is all.

A. He also said—

Mr. Gertler: Hold it.

[Witness excused.]

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: How much time do you want to submit memoranda?

Mr. Ward: It depends upon Your Honor's wish.

The Court: It seems to me the prime question is whether or not the divorce decree is or is not valid.

Mr. Ward: That is one phase of the case that will turn around the other cases. We can get around that very soon. [fol. 397] But there is another phase of the case that I want to bring up today, and that is the Armstrong case that went up from Florida to the Supreme Court of the United States.

The Court: I will simplify it for you. In my opinion, the evidence is wholly and totally insufficient to destroy the presumption of correctness of the divorce decree. I think the burden is upon the person who attacks it, and I think the evidence falls remarkably short of it.

I discount completely and entirely the statement that Mrs. Simons made as to the friendly relationship between her and her husband, because of the letter she wrote him saying that there is no reason why he should hate her like he does. That is in Defendant's Exhibit P.

Mr. Ward: That is right.

The Court: They were dealing at arm's length.

The exact date has not been stated, but she stated she had this conversation over the telephone with Mr. Simons about

the pendency of the divorce suit, and the next day she and her sister went out to see him.

The Clerk's certificate showed that the notice was mailed from the Clerk's office on the 14th of March. Presumably, she would not have received it before the 16th, and more likely the 17th, depending upon the day of the week, and [fol. 398] there is testimony that the man was here dictating to two people at that time.

Mr. Ward: On the 19th.

The Court: On the 17th.

Mr. Levenson: The 17th he got here, Nolan-Brown car certificate, the affidavit of title.

Mr. Ward: That is why we want to file a memorandum. The case was filed on the 11th, and I think the Clerk's certificate shows it was sent up on the 14th.

The Court: It went up on the 14th.

Mr. Ward: That is one thing.

The Court: That is the Clerk's certificate, and that was done after correction was made by the Jewish Floridian, the ones who published the notice, because it gave the street, and there is a notation by the Clerk that this was mailed out on the 14th.

Mr. Ward: The certificate was in there, and I am not too clear about that. There was that confusion about the correction. These papers could have gone out.

Still I want to cover that correspondence on that particular point, because that angle is present there.

But we say there are other angles in this correspondence that show to the contrary about the residence requirements. [fol. 399] Of course, it is a question from a matter of law whether it makes any difference.

The Court: On this, she was lulled into a false sense of security.

Her testimony does not gibe with the facts, because she has not said when it was. But she said it was a day or two after she got it.

They were dealing at arm's length. He was angry with her, because she had brought these proceedings to increase the alimony, and she had to have it done legally. But she had nothing done legally about stopping the divorce here.

After she talked to him, she went to a man who said that the Florida divorce was no good. The attorney may have given her a false sense of security.

From the evidence here, I do not think Mr. Simons did, and I discount her testimony as to their conversation. I do not think it is true.

Mr. Ward: I still would like to file a memorandum, assuming that that would be the Court's finding of the facts. I still want to present the matter to the Court.

The Court: Of course.

Mr. Ward: I would like to have until Monday to do so.

Mr. Sibley: Fine. We will file ours.

[fol. 400] The Court: I am satisfied in so far as the time element is concerned. You may have a reasonable time to do it. I will not hold you to Monday. Take a reasonable time, and I am sure you will not take an abusive time.

Mr. Ward: The first part of the week.

The Court: I will not hold you to Monday. I will give you a reasonable time. If it gets unreasonable, I will call you up and say that you have so many days to get it in.

There is no urgency in so far as the bank is concerned.

Mr. Sibley: No.

The Court: I know Mr. Ward is a busy lawyer. I know he gets his work out. If you can get it out by Monday, fine.

[Thereupon the hearing was concluded at 12:05 p.m.]

[fol. 401] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 402]

PLAINTIFF'S EXHIBIT 3

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

IN CHANCERY

No. 148091E

[Stamp—Filed for Record—Mar 11 3 48 PM 1952—E. B. Leatherman, Clk. of Dade Co. Fla.]

[Stamp—Filed—Mar 11 1952—E. B. Leatherman, Clerk of Circuit Court]

SOL SIMONS,

Plaintiff,

—vs.—

LUCY C. SIMONS,

Defendant.

BILL OF COMPLAINT FOR DIVORCE and VERIFIED STATEMENT RE DEFENDANT'S ADDRESS

COMES Now the plaintiff, SOL SIMONS, by his undersigned solicitor, and brings this his Bill of Complaint for Divorce against the defendant, LUCY C. SIMONS, and thereupon complaining says:

I.

That the plaintiff is a bona fide resident of Dade County, Florida, and has been such for more than ninety (90) days immediately preceding the filing of the Bill of Complaint: that after diligent search and inquiry has been made to discover the name and residence of the defendant, LUCY C. SIMONS, that the defendant is a resident of some state and county other than the State of Florida; that the said name and residence of the said defendant are set forth herein as particularly as are known unto the plaintiff:

LUCY C. SIMONS
Hotel Beacon
75th Street at Broadway
New York, N. Y.

That there is no person in the State of Florida the service of a subpoena upon whom would bind the defendant: that the age of the defendant is known to the plaintiff and that said defendant is over the age of twenty-one (21) years; that the defendant is not in, or engaged in, military or naval service or any other armed service branches of the United States of America at the time of the filing of this suit and that this verified statement is made for the purpose of securing an Order for Publication pursuant to the Statutes of the State of Florida, and in accordance with the Acts of Congress relating to military or naval service.

II.

That the plaintiff and defendant were married to each other on the 5th day of September, 1941, in the City and State of New York.

[fol. 403]

III.

That no children have been born to the parties hereto as the issue of said marriage.

IV.

During their married life together, plaintiff has at all times conducted himself as a true and faithful husband and has done everything within his power to make the marriage a happy one but the defendant has been guilty of extreme cruelty and desertion which plaintiff will more fully prove by testimony at the time of the trial.

V.

That the defendant misrepresented her age to the plaintiff and at the time of their marriage stated in her application for a marriage license that she was 36 years of age when in truth and fact she was 43 years of age and plaintiff was 42 years old. That the plaintiff had entered into marriage with the defendant with the avowed purpose and common understanding and agreement that there should be issue of said marriage but that the defendant at all times during the course of said marriage refused to permit co-

habitation for the purpose of procreation. That the real age of the defendant was a factor in her refusal to bear children and that the plaintiff did not learn of the defendant's true age until 1946 after the defendant had deserted the plaintiff.

VI.

During the married life of the parties and prior to February 28, 1946, the defendant on numerous occasions—more than ten in number—deserted and abandoned the plaintiff herein and left their marital domicile and, due to the entreaties of the plaintiff, returned. That on February 28, 1946, after about four years of marriage, without good and proper cause and justification, the defendant left the marital domicile and has never resided with your plaintiff as man and wife or in any capacity for the past six years and her desertion has been wilful, continuous and obstinate.

VII.

That during the married life of the parties, the defendant indulged in constant and repeated requests, nagging and demands for residence in a New York apartment hotel, jewelry, country club membership, summer cabanas, a mink coat and two or three other fur coats, an automobile for herself, shoes and other articles of clothing from the most expensive shops, winter and summer cruises, and articles of luxury over and above her needs and requirements and for exhibitionistic purposes and beyond the means of the plaintiff. Upon plaintiff's failure and refusal to accede to [fol. 404] these onerous and unjustified demands, he was met with refusal on the part of defendant to cohabit with and indulge in sexual relations with the plaintiff and with vituperation and abuse and accusations to the effect that the plaintiff was "despicable", "stingy", "mean", "tight", "fat fool", and many other uncomplimentary terms.

VIII.

That the defendant constantly taunted the plaintiff with the fact that she could obtain the fulfillment of all her desires by going with other men and flaunted the threat to

leave and desert the plaintiff, and did on many occasions (more than ten in number) desert and leave the plaintiff. She flirted with customers of the plaintiff and other masculine acquaintances, which caused him embarrassment and humiliation.

IX.

That the plaintiff has for many years suffered from osteomylitis, of which condition the defendant was aware prior to their marriage and which condition required peace and quiet and an absence of aggravation and emotional upset. That the defendant, as a result of her conduct and acts which were studied and prolonged over a long period of time, caused the plaintiff to suffer intense mental pain and anguish, to become highly nervous and impair his health and, as a result of the defendant's extreme cruelty to the plaintiff, the plaintiff was required to have medical care and attention, developed high blood pressure and high sugar in blood. That while the plaintiff was under medical care and attention at the Park East Hospital prior to the defendant's desertion of the plaintiff, the defendant went out of town in spite of the remonstrance of the plaintiff and showed a complete absence of regard and consideration.

X.

The plaintiff's physical condition has deteriorated: he has been advised by competent medical experts that he must, for the preservation of his life, move to Florida and abate his activities in business and live on an extreme form of diet. The diet requires preparation of food at home in a manner not available at restaurants or other public dining places. The plaintiff also suffers from nose bleeds, high blood pressure and sugar in his blood and a constant fear of a repetition of heart attack. He must have a housekeeper to prepare his food and sleep in as a practical nurse in the event there should be any impairment of his health during the course of a night. It is impossible to secure any such employee because of plaintiff's marital status and it is therefore essential, for the preservation of plaintiff's health and life that there be a decree of

[fol. 405] divorce annulling the bonds of matrimony presently existing.

XI.

That the defendant almost monthly suffered or experienced moody spells and would fly into hysteria and tantrums on the slightest provocation and would refuse to have sexual intercourse with the plaintiff and would not discharge any of the other duties and obligations of a wife. That for a considerable period the defendant undertook a course of conduct to poison the minds of the plaintiff's relatives against him and attempted to hold him up to the scorn and derision of his relations and levelled against him many unjust and untrue accusations and attempted to extort monies and other property from the defendant over and above her normal requirements. That the defendant constantly nagged the plaintiff and made life unbearable for him, aggravating his physical health and nervous condition, criticizing his habits and exposing him to scorn and derision.

WHEREFORE, the plaintiff charges the defendant with being guilty of extreme cruelty within the meaning and purview of the laws and statutes of the State of Florida, as made and provided, and prays:

1. That the defendant be required to make full, true and direct answer to the Bill of Complaint, but not under oath, answer under oath being expressly waived.

2. That the plaintiff may be divorced and forever freed from the bonds of matrimony heretofore and now existing between the plaintiff and the defendant.

3. That he may have such other and further relief as to this Honorable Court may seem just and proper.

AND PLAINTIFF WILL EVER PRAY.

/s/ SOL SIMONS

STATE OF FLORIDA)
) ss:
COUNTY OF DADE)

Before me, the undersigned authority, personally appeared SOL SIMONS, plaintiff in the above styled cause who, being by me first duly sworn, deposes and says that he has read the above and foregoing Bill of Complaint for Divorce and that the allegations contained therein are true and correct.

/s/ SOL SIMONS

Sworn to before me this
20 day of February 1952.

/s/ SEYMOUR B. LIEBMAN
Notary Public of the
State of Florida

(Notarial Seal)

[fol. 406]

NOTICE BY PUBLICATION

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

IN CHANCERY

No. 148091

[Stamp—Filed—Mar 11 1952—E. B. Leatherman, Clerk of Circuit Court]

[Stamp—Filed for Record—Mar 11 3 48 PM 1952]

[Handwritten notation—1 paper—1 deft.—paid]

SOL SIMONS,

Plaintiff,

—vs.—

LUCY C. SIMONS,

Defendant.

SUIT FOR DIVORCE

To: LUCY C. SIMONS,
Hotel Beacon,
75th Street at Broadway, New York, N. Y.

You

are hereby notified that a Bill of Complaint for Divorce has been filed against you, and you are required to serve a copy of your Answer or Pleading to the Bill of Complaint on the plaintiff's Attorney, Seymour B. Liebman, 350 Lincoln Road, Miami Beach 39, Florida and file the original Answer or Pleading in the office of the Clerk of the Circuit Court on or before the 11th day of April, 1952. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Bill of Complaint.

This notice shall be published once each week for four consecutive weeks in THE JEWISH FLORIDIAN.

DONE AND ORDERED at Miami, Florida, this 11th day of March, A.D. 1952.

E. B. LEATHERMAN, Clerk,
Circuit Court, Dade County, Florida

(Circuit Court Seal)

By /s/ R. H. RICE, JR.
Deputy Clerk

[Handwritten notation—correction made as per call from Jewish Floridian—3-14-52—B. M. Shipp, d.c.]

/s/ SEYMOUR B. LIEBMAN
Seymour B. Liebman, Esq.
350 Lincoln Road,
Miami Beach 39, Fla.

Attorney(s) for Plaintiff

(Publish) March 14th, 21st, 28th and April 4th

[Stamp—Copy of Notice and Bill of Complaint mailed on 3-14 1952 to each defendant whose address disclosed in sworn statement. E. B. LEATHERMAN, Clerk Circuit Court, By /s/ B. H. SHIPP D.C.]

[fol. 407]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

IN CHANCERY

No. 148091-E

SOL SIMONS,

Plaintiff,

—vs.—

LUCY C. SIMONS,

Defendant.

MOTION FOR DECREE PRO CONFESSO

COMES Now the Plaintiff, SOL SIMONS, by and through his undersigned attorney, and moves this Court for the entry of a Decree Pro Confesso against the defendant, LUCY C. SIMONS, assigning as his reason therefor that the defendant has failed to serve a copy of her Answer to the Complaint upon the plaintiff's attorney, or to file said Answer with the Clerk of the Circuit Court within the time required by law.

/s/ SEYMOUR B. LIEBMAN
Seymour B. Liebman
Attorney for Plaintiff
350 Lincoln Road
Miami Beach 39, Fla.

ORDER

DECREE PRO CONFESSO

THIS CAUSE came on to be heard upon the above and foregoing Motion and after due consideration thereof, the Court has

ORDERED, ADJUDGED and DECREED that the Complaint herein be taken as confessed by the defendant for her failure to serve a copy of her Answer upon the plaintiff's at-

torney, or to file the original thereof with the Clerk of the above styled Court within the time prescribed by law.

DONE and ORDERED at Miami, Dade County, Florida, this 15 day of April, 1952.

/s/ VERNON HAWTHORNE
CIRCUIT JUDGE

[fol. 408]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY

IN CHANCERY

No. 148091E

SOL SIMONS,

Plaintiff,

—vs.—

LUCY C. SIMONS,

Defendant.

ORDER OF REFERENCE

THIS CAUSE being at issue, it is hereby referred to Harold Zinn, Esq. who is hereby appointed Special Master in Chancery and directed to take the testimony and report same, together with his findings of fact and conclusions of law to the Court, with his recommendations.

DONE and ORDERED in Chambers at Miami, Florida, this 15th day of April, 1952.

/s/ VERNON HAWTHORNE
CIRCUIT JUDGE

Seymour B. Liebman, attorney for Plaintiff, moves the entry of the foregoing Order.

/s/ SEYMOUR B. LIEBMAN
Seymour B. Liebman
Attorney for Plaintiff
350 Lincoln Road
Miami Beach, Fla.

[fol. 409]
[Handwritten notation—Admitted in evidence as plaintiff's exhibit #1. April 24, 1952. Zinn, Special Master]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR THE COUNTY OF DADE, FLORIDA. IN CHANCERY.

No. 148091-E

SOL SIMONS, Plaintiff,

—against—

LUCY C. SIMONS, Defendant.

DEPOSITION DE BENE ESSE

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

The examination of SADIE FISHER, witness for the Plaintiff in this cause, taken de bene esse, on the 18th day of April, 1952, before the undersigned, GRACE TELLER, Notary Public, at her office, at 270 Broadway, in the Borough of Manhattan, New York City, New York, in the above styled cause now pending in the Circuit Court of the Eleventh Judicial Circuit, In and For Dade County, Florida, at which examination was present SADIE FISHER, witness for the Plaintiff in this cause, and the following proceedings were had:

SADIE FISHER, after being duly sworn, deposes and answers the following questions as follows:

1. Q. What is your name?
A. Sadie Fisher.

[fol. 410] 2. Q. Where do you reside?
A. 240 Kent Drive, Hewlett, Long Island, New York.

3. Q. Are you related to the Plaintiff, Sol Simons?
A. Yes. I am his aunt.

4. Q. Do you know Lucy C. Simons?
A. Yes.

5. Q. How long have you known her?
A. Since they were married. In fact, beginning about six months before they were married.

6. Q. Have you been in close contact with Sol Simons?
A. Yes, until he left to take up residence in Florida. I saw him in Florida, where I resided continuously for a period of five weeks from January 31, 1952 to March 4, 1952. During this time I stayed at his apartment and prepared meals and kept house for him.

7. Q. What did you observe of his physical condition, or what do you know of it?
A. I know that he is very nervous, he gets dizzy spells frequently and complains of pains in his head. I understand that he has a heart condition and I know that he stays on a salt-free diet on advice of his doctors. He has been suffering for some time from osteomyelitis, which affects his hip and his arm.

8. Q. Did Lucy ever show any concern for Sol's physical condition?
A. Never. On the contrary, when Sol would come back from a trip, after traveling all night by car, and had to treat his hip, which was open and needed dressing, she would insist on getting what she wanted settled before he [fol. 411] could even take a shower or relax. She told me that that was the time to make him promise things—when he was tired and exhausted.

9. Q. During the married life of Sol Simons and Lucy C. Simons, did you speak frequently to Lucy?
A. Yes. Up to the time she left him for the last time. Before that, she met with me frequently and confided in me. She often came to see me right after she would leave Sol.

10. Q. On how many occasions did she leave Sol?
A. I cannot recall exactly but I do know of at least four occasions when she left him and then came to see me.

At times she asked that I let her stay with me but I never agreed to have her do so. She would tell me to call up Sol and ask him if she were home, and if he said that she was not, for me to ask him why she left.

11. Q. Did she ever tell you the reasons for leaving Sol and if so, what did she say?

A. Yes. She said that she wanted to live in New York, that she wanted more social life and she did not want his business office to be conducted from their apartment. She felt that they should live in an apartment hotel in Manhattan. She said she ought to have a car for herself and that she wanted a mink coat. She tried to have me scheme with her to get Sol to buy her such mink coat. Sol could not go away in the Summer and would take her to the beach on a hot day. She said that this was no diversion [fol. 412] to her and that she needed a cabana at the beach so she could go there whenever she pleased. This is also one of the reasons she wanted an automobile for her own use. She said all her friends were buying clothes at expensive shops and that she ought to buy her clothes at such places as Bergdorf Goodman and Hattie Carnegie.

12. Q. Did she ever say anything to you about membership in a country club?

A. She was envious of Sol's brother because he belonged to a country club and she could not see why Sol did not do the same. She was always envious of what others had and did.

13. Q. Did you ever talk to her about the need for such expenses?

A. I often told her that due to Sol's physical condition, he could never get life insurance and that they would do well to conserve their money. Lucy said she was interested in the present and not in the future.

14. Q. Did you ever have any talks with her regarding children?

A. I told Lucy that if she had a family, all these things would not be important to her. She said that at her age, she would not consider having a family.

15. Q. Did you ever hear Lucy apply any names or epithets to Sol?

A. I did not hear her say such things to Sol but she told them to me about Sol. She said he was stingy, that he was a big pig and had no manners, that he was crude, that [fol. 413] he was tight and mean, and many other uncomplimentary terms. I often said to her, "How can you discuss your husband in that manner when you are living with him?" and she said that she had confidence in me and knew that I would not repeat. Later, I found that she had told the same things to others.

16. Q. What more do you know of Sol's physical condition?

A. I know that due to the osteomyelitis, which at times caused him terrific pain and discomfort, he requires peace and quiet and a good deal of rest. It was almost impossible to have such things under the conditions in which he and Lucy were living. Her actions made him nervous and irritable and he eventually developed a high blood pressure.

The transcript of this testimony has been read by me.

/s/ Sadie Fischer

Subscribed and sworn to
before me, a Notary Public
of the State of New York,
this 18th day of April, 1952.

/s/ Grace Teller

Grace Teller
Notary Public, State of New York
No. 03-9300750
Qualified in Bronx County
Certs. filed with Bronx, Kings & N. Y.
County Clerks & Registers Offices
Commission Expires March 30, 1954.

[Notarial Seal]

[fol. 414]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

IN CHANCERY No. 148091-E

SOL SIMONS, Plaintiff,

—VS.—

LUCY C. SIMONS, Defendant.

NOTICE OF FILING MASTER'S REPORT

To: SEYMOUR B. LIEBMAN, Esq.
Attorney for Plaintiff
350 Lincoln Road
Miami Beach, Florida

YOU WILL PLEASE TAKE NOTICE that I have filed my Report in the above-styled cause on the 28th day of April, 1952.

/s/ HAROLD ZINN
Harold Zinn,
Special Master in Chancery

I CERTIFY that a copy of the foregoing Notice of Filing Master's Report was mailed to the office of the above address this 28th day of April, 1952.

/s/ HAROLD ZINN
Harold Zinn,
Special Master in Chancery

[fol. 415]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

IN CHANCERY No. 148091-E

SOL SIMONS, Plaintiff,

—vs.—

LUCY C. SIMONS, Defendant.

SPECIAL MASTER'S REPORT, FINDINGS AND RECOMMENDATIONS

Pursuant to an Order of Reference entered in this cause by the Hon. N. VERNON HAWTHORNE, Circuit Judge, on the 15th day of April, 1952, the above cause was referred to me as Special Master in Chancery for the purpose of taking testimony of the parties thereto, and for the reporting of the same to this Court, together with my findings of law and fact.

I set the cause down for the taking of testimony at the office of SEYMOUR B. LIEBMAN, Esq., Attorney for the Plaintiff, at Room 310, 350 Lincoln Road, Miami Beach, Florida, on the 24th day of April, 1952, commencing at 4:00 o'clock p.m.

There were present the following:

SEYMOUR B. LIEBMAN, Esq.
Attorney for Plaintiff
350 Lincoln Road
Miami Beach, Florida

HAROLD ZINN, Esq.
Special Master in Chancery
605 Lincoln Road
Miami Beach, Florida

SOL SIMONS,
Plaintiff
1110 Venetian Way
Miami Beach, Florida

NATHAN NEWMARK,
Witness for Plaintiff
1601 Lenox Avenue
Miami Beach, Florida

ALBERT JAMES MARTIN,
Witness for Plaintiff
927 Morningside Drive
Miami Springs, Florida

ETHEL H. DEUTSCH,
Court Reporter

[fol. 416] The testimony taken before me, consisting of eleven (11) typewritten pages, is filed herewith and made a part of this report.

PLEADINGS

The plaintiff filed his Bill of Complaint for Divorce on the 11th day of March, 1952, charging the defendant with "Extreme Cruelty." Constructive service was initiated by the filing of a Notice by Publication simultaneously with the filing of the Complaint, and perfected by the filing of a proof of publication of the Notice by Publication on the 7th day of April, 1952. Thereafter, the Court entered a Decree Pro Confesso on the 15th day of April, 1952, for the defendant's failure to plead within the time required by law. This cause became at issue and ready for the taking of testimony upon the Complaint and the Decree Pro Confesso entered against the defendant herein.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Bill of Complaint is legally sufficient and states a cause of action.

2. The plaintiff has, by competent and corroborated evidence, established that he is a bona fide resident of the State of Florida, and has been such resident for more than ninety (90) days prior to the 11th day of March, 1952, (tt. 2, 3, 4, 5, and 6).

3. The plaintiff has proved by his corroborated testimony the grounds for divorce alleged in his Bill of Complaint, (tt. 6, 7, 8, 9, 10, and 11).

4. There were no children born as a result of this marriage.

5. There are no property rights to be adjudicated herein.

[fol. 417]

RECOMMENDATIONS

1. That the plaintiff, SOL SIMONS, be awarded a Final Decree of Divorce, A VINCULO MATRIMONII, from the defendant, LUCY C. SIMONS.

I hereby certify that I have been paid a Special Master's Fee of $25.00 by SEYMOUR B. LIEBMAN, Esq., Attorney for the Plaintiff.

/s/ HAROLD ZINN

Harold Zinn,
Special Master in Chancery

[fol. 419]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR DADE COUNTY

IN CHANCERY No. 148091

SOL SIMONS, Plaintiff,

—vs.—

LUCY C. SIMONS, Defendant.

TRANSCRIPT OF TESTIMONY

THIS CAUSE came on to be heard before HAROLD ZINN, Esq., as Special Master in Chancery, at Room 310, 350 Lincoln Road, Miami Beach, Florida, on the 24th day of April, 1952, commencing at 4:00 o'clock P. M.

APPEARANCES:

SEYMOUR B. LIEBMAN, ESQ.,

On behalf of the Plaintiff.

(No appearance on behalf of Defendant.)

[fol. 420] Thereupon, the following proceedings were had:

NATHAN NEWMARK, JR., witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Liebman:

Q. Please state your name and address.

A. Nathan Newmark, 1601 Lenox Avenue, Miami Beach, Florida.

Q. Mr. Newmark, how long do you know Mr. Simons?

A. About 30 years.

Q. And are you a resident of Dade County, Florida?

A. Yes, sir.

Q. How long have you been a resident of Dade County Florida?

A. Since December, 1939.

Q. Do you know when Mr. Simons moved to Miami Beach, Florida?

A. I believe about mid-November, 1951.

Q. Did you see him when he first came down here?

A. Yes, I did.

Q. Do you know if he has a home here?

A. Yes.

Q. Do you know where that is?

A. It is over on the Venetian Causeway, right near the toll post. I don't remember the name.

Q. Is that Sandpiper Villas?

A. Sandpiper, that's right.

Q. And did you have any conversation with Mr. Simons about whether he is going to become a permanent resident of Florida?

A. Well, he told me he came down here on account of his health. His doctor told him to come down. He told me it did [fol. 421] him good.

Q. Since the middle of November, 1951, have you seen Mr. Simons in Florida?

A. Oh, yes, regularly, practically every week or so.

Q. Some weeks more than once a week?

A. That's right.

Q. And did you visit his home and has he visited at yours?

A. That's right.

Q. Has Mr. Simons told you whether he intends to remain a permanent resident of Florida, regardless of the outcome of this action?

A. Yes; he told me he is going to conduct his business and live here permanently.

Mr. Liebman: That's all for this witness.

The Master: No questions.

Thereupon: ALBERT JAMES MARTIN, witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Liebman:

Q. Please state your name and address.

A. Albert James Martin, 927 Morningside Drive, Miami Springs, Florida.

Q. Mr. Martin, how long do you know Mr. Simons?

A. Since spring of 1942.

Q. And do you know about when Mr. Simons moved to Florida?

A. He came in November of last year, and the first time I saw him, he phoned me and we had dinner together, Thanksgiving Day.

[fol. 422] Q. Did he have any conversation with you as to whether he was going to make Florida his permanent residence?

A. Yes; we talked a good deal about that. We were so closely connected in New York and with our association up there, he told me he had transferred his home here permanently and business connections and we were looking to get into business together.

Q. Did he at any time state he was going to remain a permanent resident of Florida, regardless of the outcome of this divorce action?

A. Yes, he has.

Q. Have you seen him upon many occasions since November, 1951?

A. On the average of twice a week, sometimes three times a week, when he is in town. He even comes down to the plant and we talk over our business down there.

Q. And you are convinced in your own mind that Mr. Simons intends to remain a permanent resident of Florida?

A. I am positive.

Mr. Liebman: Any questions, Mr. Zinn?

The Master: No questions.

(Witness excused.)

Thereupon: Sol Simons, the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Liebman:

Q. Mr. Simons, are you the plaintiff in this action?

A. I am.

[fol. 423] Q. Where do you live?

A. 1110 Venetian Way, Miami Beach, Florida.

Q. And when did you move to Florida?

A. I took possession of that apartment about the 20th of November. I moved here a few days before that.

Q. And do you intend to have Florida as your permanent address?

A. Yes.

Q. Why did you move to Florida?

A. I have been suffering from osteomyelitis since 1929. I have also had sugar in my blood, which is due to this osteomyelitis. I have also developed high blood pressure and had a slight heart attack once in 1950 and then again in 1951. The doctor told me that unless I would take it easy and change my manner of doing business and also change the climate and life where I can be more relaxed and have more quiet, he couldn't do anything for me and wouldn't be responsible.

Q. When you moved here, did you bring all of your personal belongings and possessions with you?

A. Yes.

Q. You have established this apartment you have at the Sandpiper Villas as your permanent address?

A. Yes, sir.

Q. You have taken out a Florida license plate for your automobile?

A. Yes, sir.

Q. And you have filed a declaration of domicile and citizenship?

[fol. 424] A. I have.

Q. And do you intend to remain a permanent resident of Florida regardless of the outcome of this action?

A. Yes.

Q. When were you married to the defendant, Lucy C. Simons?

A. September 5th, 1941.

Q. Where were you married?

A. In New York City.

Q. Were any children born as a result of that marriage?

A. No.

Q. And during your married life did you do everything in your power to have a happy home and a happy marriage?

A. Yes.

Q. Did your wife work right after you were married?

A. For about five months.

Q. Prior to your marriage, did you have any conversations with your wife about having children?

A. I did.

Q. What were those conversations?

A. I told her that I wanted to have children, since I was getting on in years, and as soon as we got ourselves set, got to know each other, living as man and wife, why I expected we would have children.

Q. Did she agree to have children?

A. She did.

Q. Some time after 1946, did you discover that your wife had misrepresented her age to you when you became married?

A. I did.

[fol. 425] Q. And just how did she misrepresent her age prior to the time you were married?

A. She represented her age at the time of the marriage as being seven years younger than she actually was.

Q. How long did your wife work after you were married?

A. About five months, I think. We were married in September and she worked until about February.

Q. After she stopped working did you have any conversation with her about having children?

A. I did.

Q. Did she consent to have children?

A. No.

Q. Did you continue asking her to have children after the first time you had spoken to her?

A. Many times.

Q. What was her answer?

A. That she didn't want to be burdened with bringing up children and she wanted to have fun and live without responsibilities.

Q. Now, during the time that you lived together as man and wife and prior to the final separation, did your wife have occasion to leave you?

A. Many times.

Q. And what was the reason that she gave for leaving you?

A. My wife made demands beyond those which I could afford in the manner of living, clothes, worldly things.

Q. In addition, did she demand that you have a summer [fol. 426] cabana?

A. That's right.

Q. Did she demand any fur coats?

A. Yes.

Q. What kind of fur coats?

A. Mink coats.

Q. Did she have any other fur coat?

A. She did.

Q. What kind?

A. She had Persian lamb and she had a caracul jacket.

Q. And she insisted on other fur coats in addition to those she already had?

A. Yes.

Q. Did she demand an automobile for herself?

A. She did.

Q. Did you have one?

A. Yes. She wanted one for her own personal use and took driving lessons for it.

Q. Did she know of your physical condition before you were married?

A. Definitely so.

Q. Did she ever have any conversation with any doctors or was she present at any time any doctors had conversations with you whereby the doctors told you what you needed for your condition?

A. Many times.

Q. Just what was said to her or in her presence about what you required on account of your physical condition?

A. I had these flare-ups of osteomyelitis and they said [fol. 427] I would have to take it easy. They said I would have to live a peaceful life, a quiet life, without aggravation, because that upset me emotionally and the reaction was to bring up these flare-ups and overwork, when my resistance got low, would cause flare-ups of this osteomyelitis and there were times I had to be cut and hospitalized

on many occasions, and she was there when the doctor visited.

Q. Was there any time you had to go to the hospital and your wife wouldn't visit you?

A. Oh, yes.

Q. Did your wife ever call you any names?

A. Many names at various times.

Q. Would you tell the Special Master what some of these names were?

A. I was "a fat fool" and I was stingy and other names.

Q. Did your wife know the fact you could not secure insurance because of your physical condition?

A. Very definitely she did.

Q. Were there any converations about your saving money in connection with her demands?

A. That was discussed many times when she made demands which I couldn't afford and I explained to her, which she already knew, that they wouldn't take me under any circumstances, even at a marked-up premium, as an insurance risk. I remarked to her that at any time my ability to work could cease and for that reason I explained to her I had to build up a little reserve.

Q. What did she say when you told her that?

A. She said, "Well, I want to live today. I want to have [fol. 428] some fun out of life", and you know the old expression: "Live today, tomorrow we die."

Q. What was your wife's conduct in connection with other men you knew or public affairs to which you went?

A. Her actions many times was very embarrassing.

Q. Did you have occasion to speak to her about her actions?

A. More than once.

Q. What did she say?

A. Nothing, actually. She says: "I don't mean anything by it."

Q. Was this done, however, to aggravate you or make you give her things you felt you could not afford to give her?

A. I lived a life of appeasement with that woman.

Q. Did all that course of conduct have any effect on you, physically or mentally?

A. It would aggravate me so at times I couldn't eat. You get a tenseness in your stomach and inside you sort of burn up.

Q. Did all these actions affect you so as to require you to have medical attention?

A. They did.

Q. Did her conduct have any effect on your blood pressure?

A. The blood pressure went way up.

Q. Is there any chance of any reconciliation between you and your wife?

A. There is not. We have been separated for over six years.

Mr. Liebman: That's all.

By the Master:

Q. You stated there were no children born of this marriage?

[fol. 429] A. No.

Q. Where did your wife live on March 11th, 1952?

A. Sir?

Q. Where did your wife live on March 11th, 1952?

A. At the Beacon Hotel, 75th Street and Broadway, New York City.

Q. How did you ascertain that?

A. She wrote me she was living there.

Q. That was prior to the time you filed this suit?

A. At least two years prior.

Q. How did you know she was still living at that place at the time you filed this suit?

Mr. Liebman: If you will permit me to ask him a few questions, I believe I can clarify that.

The Master: All right.

By Mr. Liebman:

Q. Do you have mutual friends who told you she lives there?

A. Yes, we do.
Q. Did you mail any checks to her at that address?
A. Yes, I did.

By the Master:

Q. You were convinced at the time you filed this suit that your wife was still there?
A. Absolutely so, and she still lives there to this day.
Q. You so learned?
A. Yes.

The Master: No further questions.

OFFER IN EVIDENCE

Mr. Liebman: At this time I offer deposition of Sadie Fisher, which is on file in this Court as Plaintiff's Exhibit 1. [fol. 430] The Master: Received in evidence.

(Thereupon, the hearing was closed.)

CERTIFICATE

I, Ethel H. Deutsch, do hereby certify that the foregoing cause was heard before HAROLD ZINN, ESQ., Special Master, on the 24th day of April, 1952; that I was authorized to and did report in shorthand the proceedings and evidence in said cause, and the foregoing pages, numbered from 1 to and including 12, contain a true and correct transcription of my report of said proceedings.

Dated, at Miami Beach, Dade County, Florida, this 25th day of April, 1952.

/s/ ETHEL H. DEUTSCH

Ethel H. Deutsch
Court Reporter

[fol. 431]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA. IN CHANCERY.

No. 148091-E

SOL SIMONS, Plaintiff,

—vs—

LUCY C. SIMONS, Defendant.

FINAL DECREE

The above and foregoing cause coming on to be heard this day before the above styled Court, upon the Bill of Complaint filed herein, and the defendant's Answer and the Report of the Special Master in Chancery filed herein, and the plaintiff's Motion for Final Decree, and it appearing to the Court that the said Court has jurisdiction of the cause and of the parties hereto and that the equities are with the plaintiff and that the defendant has been guilty of extreme cruelty towards the plaintiff, and the Court being otherwise fully advised in the premises, it is, upon consideration,

ORDERED, ADJUDGED and DECREED, as follows:

1. That the plaintiff has established by ample and competent proof the allegations in the Bill of Complaint and that the equities in this cause be and the same are hereby found to be with the plaintiff, and the Report of the Special Master in Chancery filed in this cause be and the same is hereby ratified and confirmed in every particular.

2. That the bonds of matrimony heretofore and now existing between the plaintiff, SOL SIMONS, and the defendant, LUCY C. SIMONS, be and they are hereby set aside and dissolved and the parties hereto are each of them divorced of and from the other a vinculo matrimonii.

DONE and ORDERED in Chambers at Miami, Dade County, Florida, this 30th day of April, 1952.

N. VERNON HAWTHORNE
Circuit Judge

Filed this 30 day of April AD 1952
recorded this 1 day of May AD 1952
in Chancery Order Book 1030 Page 551
E. B. Leatherman
Clerk, Circuit Court

By S. E. DOUGHTY

The Jewish Floridian

Published Weekly

MIAMI DADE COUNTY FLORIDA

STATE OF FLORIDA }
COUNTY OF DADE } SS:

Before the undersigned authority personally appeared FRED K. SHOCHET, who on oath says that he is Business Manager of THE JEWISH FLORIDIAN, a weekly newspaper published at Miami in Dade County, Florida; that the attached copy of advertisement, being a true copy in the matter of

Notice by Publication
Sol Simons, Plaintiff
vs.
Lucy C. Simons, Defendant

In the Circuit Court of the Eleventh Judicial Circuit of Florida, was published in said newspaper in the issues of

March 14, 1952
March 21, 1952
March 28, 1952
April 4, 1952

Affiant further says that the said THE JEWISH FLORIDIAN is a newspaper published at Miami, in said Dade County, Florida, and that the said newspaper has heretofore been continuously published in said Dade County, Florida, each week and has been entered as second class mail matter at the post office in Miami, in said Dade County, Florida, for a period of one year next preceding the first publication of the attached copy of advertisement; and affiant further says that he has neither paid nor promised any person, firm or corporation any discount, rebate, commission or refund for the purpose of securing this advertisement for publication in the said newspaper.

Filed this 7 day of Apr. A.D. 19 52
and recorded this 7 day of Apr. A.D. 19 52
in Chancery Order Book 1027 Page 523
E. B. LEATHERMAN
Clerk Circuit Court
By [illegible] Deputy

NOTICE BY PUBLICATION
IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY. IN CHANCERY.
No. 148091

SOL SIMONS, Plaintiff,
vs.
LUCY C. SIMONS, Defendant.

SUIT FOR DIVORCE

TO: LUCY C. SIMONS,
Hotel Beacon,
75th Street at Broadway,
New York, N. Y.

You are hereby notified that a Bill of Complaint for Divorce has been filed against you, and you are required to serve a copy of your Answer or Pleading to the Bill of Complaint on the plaintiff's attorney, SEYMOUR B. LIEBMAN, 350 Lincoln Road, Miami Beach 39, Florida, and file the original Answer or Pleading in the office of the Clerk of the Circuit Court on or before the 11th day of April, 1932. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Bill of Complaint.

DONE AND ORDERED at Miami, Florida, this 11th day of March, A.D. 1932.

E. B. LEATHERMAN,
Clerk, Circuit Court,
Dade County, Florida
(Circuit Court Seal)
By R. H. RICE, JR.
Deputy Clerk

SEYMOUR B. LIEBMAN, ESQ.
Attorney for Plaintiff
350 Lincoln Road
Miami Beach 39, Fla.
3/14-21-28 — 4/4

101-484

Before the undersigned authority personally appeared FRED K. SHOCHET, who on oath says that he is Business Manager of THE JEWISH FLORIDIAN, a weekly newspaper published at Miami in Dade County, Florida; that the attached copy of advertisement, being a true copy in the matter of

Notice by Publication
Sol Simons, Plaintiff
vs.
Lucy C. Simons, Defendant

In the Circuit Court of the Eleventh Judicial Circuit of Florida, was published in said newspaper in the issues of

March 14, 1952
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Sworn to and subscribed before me this 4 day of April, A. D. 1952.

Notary Public

and recorded this ..... A.D. 19..52
day of APR A.D. 1952
in Chancery Order Book 1927 Page 523
E. B. LEATHERMAN
Clerk Circuit Court
By ..... Deputy

NOTICE BY PUBLICATION
IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY, IN CHANCERY.
No. 148091

SOL SIMONS, Plaintiff,
vs.
LUCY C. SIMONS, Defendant.
SUIT FOR DIVORCE

TO: LUCY C. SIMONS,
Hotel Benson,
75th Street at Broadway,
New York, N. Y.

You are hereby notified that a Bill of Complaint for Divorce has been filed against you, and you are required to serve a copy of your Answer or Pleading to the Bill of Complaint on the plaintiff's attorney, SEYMOUR B. LIEBMAN, 330 Lincoln Road, Miami Beach 39, Florida, and file the original Answer or Pleading in the office of the Clerk of the Circuit Court on or before the 11th day of April, 1952. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Bill of Complaint.

DONE AND ORDERED at Miami, Florida, this 11th day of March, A.D. 1952.

E. B. LEATHERMAN,
Clerk, Circuit Court,
Dade County, Florida
(Circuit Court seal)
By R. H. RICE, JR.
Deputy Clerk

SEYMOUR B. LIEBMAN, ESQ.
Attorney for Plaintiff
330 Lincoln Road
Miami Beach 39, Fla.
3/14-21-28 — 4 t

[illegible]

[fol. 433]

PLAINTIFF'S EXHIBIT 4

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

LUCY C. SIMONS, Plaintiff,

vs.

SOL SIMONS, Defendant.

Room 238, New York County Court House,
Tuesday, January 29, 1952, 10:15 AM

Before: Hon. David L. Weil, Official Referee.

Appearances:

Jerome Mayer, Esq. (1819 Broadway), Attorney for Plaintiff.

Millard & Greene, Esqs. (270 Broadway), By: Myron J. Greene, Esq., of Counsel, Attorneys for Defendant.

Edmund J. Murphy, Official Stenographer.

[fol. 434] Mr. Greene: I will supply the stenographer's minutes.

Mr. Mayer: I would like to call Mr. Simons.

SOL SIMONS, the defendant, called by the plaintiff, being first duly sworn, testifies as follows:

The Witness: 1110 Venetian Way, Miami, Florida.

Direct examination.

By Mr. Mayer:

Q. Mr. Simons, what business are you in, sir?
A. I am a broker, commissions, selling agent.

Q. What do you sell?

A. I sell frozen fruits and fruit juices to the manufacturers of jams and jellies and wine.

Q. How long have you been in that business?

A. Since 1942.

Q. Where do you make your office?

A. My office is in my home.

The Referee: Where, in Florida?

The Witness: Yes.

Q. Since when have you been making your home in Florida?

A. For about three months.

Q. Do you still maintain a residence in Forest Hills?

A. It is now in the course of being sold or liquidated.

[fol. 435] Q. And until then you kept your office there too?

A. That is right.

Q. Are you what is known as a traveling salesman?

A. That is right.

Q. Where do you keep your bank accounts?

A. My bank accounts are kept at different times in different places, but for the most part in regular accounts.

The Referee: Where?

The Witness: In regular bank accounts, where I have been for a number of years.

The Referee: He asked where do you keep it.

The Witness: I have bank accounts in New York City.

Q. What is that?

A. In New York City.

Mr. Greene: Give him the names.

The Witness: The Sterling National Bank in Forest Hills and the National City Bank in Forest Hills, the Miami Beach First National Bank in Miami Beach.

Q. What was that last one?

A. Miami Beach First National Bank, Miami Beach.

Q. Are these regular checking accounts?

A. That is right.

[fol. 436] Q. Do you know the balances in these accounts?

A. The approximate balance in the National City is about anywhere from $3200 to $3500 or $3600. The Sterling National Bank is about $5,300; the Miami Beach bank is about $20,000.

Q. When did you open that account in the National Bank of Miami Beach?

A. That was opened when I had to go to Florida on the doctor's orders.

Q. When was that?

A. That was sometime in November.

Q. That was after the commencement of this matter?

A. Oh, yes.

Q. Is all of the money that you have referred to your own?

A. Subject to certain moneys that I owe, it is, except in one particular—that is a question, but it is not of material difference.

Q. What is the question?

A. The question is some money which is now in the course of being taken care of, based on storage charges, shortage of merchandise that has been packed; it is not of any consequence, little differences that come up due to shortages in weight, shipping and storage charges, not of material consequence.

Q. Do you have any savings accounts?

A. No, sir.

[fol. 437] Q. Any safe deposit boxes?

A. Yes, box.

Q. Where?

A. I have it in the Sterling National Bank.

Q. Is that in Forest Hills?

A. That is right.

Q. What do you have there?

A. I have a box there for $5.

Q. What do you have in the box?

A. What do I have in the box? Securities.

Q. Can you list the securities?

A. Yes, I can.

Q. Will you do so?

A. I have eleven bonds, Treasury Bonds, that I have owned for a number of years; I have about 30 shares of—

Q. Just a minute. Eleven bonds of how much?

A. $1000.

Q. That is $11,000 in bonds?

A. That is right.

Q. Go ahead.

A. I have about 1080 shares of Canada Dry Ginger Ale, common stock.

Q. Go ahead.

A. I have about 30 shares of Guarantee Trust Company common stock.

Q. Do you have any other assets?

A. Other than an automobile and personal belongings.

Q. What kind of an automobile do you have?

A. I have a Cadillac.

Q. What year?

A. 1950.

[fol. 438] Q. Where is that?

A. It is here.

Q. Where do you garage it?

A. Right in the building I live in.

Q. Do you have another car?

A. No, sir.

Q. Did you have another car?

A. With the exception of a period of four or five weeks, I previously owned a Buick. In getting this Cadillac, it was gotten at the tail end of the year, when the new model was coming out; the arrangement the dealer wanted to allow on the car that I had was too low; so I made arrangements to sell it privately, and I had both of them since the time the new car was delivered. I had to go on a trip, I took the old car on a trip. That was sold and that was perhaps four or five weeks. That is the only time I have ever owned two cars at the same time, and only because of the fact that I realized more at a private sale than the dealer was willing to allow me.

Q. Did you bring your income tax returns?

A. I have brought a transcript of them.

Q. May I see it, please?

Mr. Greene: What years?

A. What year do you want?

Q. I would like to see the last several years. How many [fol. 439] have you got with you?

A. I have got everything from 1943 to date. I will be glad to give you the figures.

Q. May I see it?

A. I will give you the figures.

Q. May I see it?

Mr. Greene: No, unless your Honor directs. Otherwise he will answer the question on his income.

Mr. Mayer: I ask that you direct him to show it to me, your Honor.

The Witness: I have some memorandum.

The Referee: Yes.

Mr. Greene: All right, give him the—

(Witness hands paper to Mr. Mayer.)

Q. Do you have the actual returns with you?

A. No, I don't.

Mr. Mayer: Your Honor, I ask that the defendant herein be directed to bring his income tax returns in at an adjourned date to be determined by you later, for the years 1946 to date.

Mr. Greene: Your Honor, we have here a situation which you will begin to see is just not to ascertain information but [fol. 440] to cause annoyance. This man is prepared to testify in answer to any questions as to his income, and he is doing so under oath; so there cannot be any question of playing any games. Now, they have got him here, he came up at the risk of business and health, he is prepared to answer all questions, and we have the information. There is no basis for adjourned hearings, there is no basis for getting the copies of tax returns when we are ready to give them the information.

The Referee: I will make no such direction.

Mr. Mayer: May I be heard, your Honor?

The Referee: I have disposed of it.

Mr. Mayer: Yes.

The Referee: I have disposed of it.

Mr. Mayer: As to the general remarks, sir—

The Referee: I have disposed of it. You asked for a direction and I have denied your application for a direction.

Mr. Mayer: I respectfully except.

Q. In 1951 you earned $50,168.70?

A. Before taxes.

Q. Before taxes.

A. That is right.

Q. That is what you reported on your tax return?

[fol. 441] A. That is right, exactly.

Q. When did you file that return?

A. That return has not been filed since the State has not fully determined the amount of tax assessable for the year. But the accountant figured the taxes based on last year.

Mr. Mayer: I object to what the accountant did, your Honor. If the accountant wants to testify, I have no objection. I would like to state for your Honor's information that this is not an attempt to harass this gentleman, despite what my colleague has said. We attempted to serve Mr. Simons personally, he evaded service, we had to get an order to serve him by publication. I had a process server out for over two months attempting to serve a subpoena on him, I have been in touch with his lawyer's office—"He is going to be in, he is going to be around." We will get the information. That is all we want, your Honor. There is not any desire to harass this man.

The Witness: If your Honor pleases—

Mr. Greene: Nobody is asking you to show anything yet.

The Witness: I have submitted to surgery.

[fol. 442] Mr. Mayer: I haven't any objection. Do you want to make a statement? Go ahead.

Mr. Greene: At the proper time. Put that away.

By Mr. Mayer:

Q. I will ask you, what is it you wanted to say?

A. I have not avoided service, I have been ill. I have evidence, documentary evidence to prove the statements you make are not so. I have the evidence (indicating).

Q. What is the source of this income that you had during 1951?

A. During the year 1950 and—

Q. I asked you about 1951.

Mr. Greene: Just answer questions—the source of income.

A. The source of the income was from commissions received from sales consummated, where merchandise was delivered and paid for.

Q. Commissions from whom?

A. From various people I did business with.

Q. Will you name them?

(Discussion.)

Q. You were telling us, Mr. Simmons, from whom you received your commissions?

A. No, I was not telling you.

[fol. 443] Q. Will you please tell us?

A. I received it from the sellers.

The Referee: What is that?

The Witness: I received it from the people I sell for. May I ask your Honor's indulgence in just a question? Before the trial for separation Mrs. Simons' attorneys went to each—I supplied all information—they went to each and every customer every second or third day, subpoenaed them, asked them to produce records of every transaction. This was over a period of time. Prior to that trial, at the trial not one single individual person was called to testify, after having been subpoenaed, having to go through a costly expense preparing these records. Because of that these people say they do not want to be involved in any expense, in my personal affairs; they refused to do business with me, they gave me no business, have given me no business since. I have been forced to re-establish myself out of town for that reason. For that reason I beg the indulgence of this Court, not to have names, since they don't want them bandied around in court, and they serve no purpose. [fol. 444] Not one of these people were used.

The Referee: Do you insist upon an answer?

Mr. Mayer: Yes, I do. I was not the counsel in that previous case. I insist upon an answer.

Mr. Greene: I object to an answer on the ground it is not material to the issue, it is not going to give them any additional information on his income than what we are going to give them.

The Referee: I think it is a proper question.

Mr. Greene: Answer it.

The Witness: Will you repeat the question again?

By Mr. Mayer:

Q. Yes. From whom?

A. I do business with Van Buren Freezing Plant, Van Buren, Arkansas.

(Discussion.)

Q. Will you proceed with the answer, please? That was Van Buren.

A. Freezing Plant, Van Buren, Arkansas.

Q. How much business did you do with them last year?

A. I have no—unless I want to hire a staff of accountants to give you everything itemized, I couldn't give it to you, because Mrs. Simons could tell you my business don't run that way.

Q. Have you books and records for the last five years? [fol. 445] A. Mrs. Simons has the record of the trial, will tell you I run it the same way.

Q. You have no books and records?

A. I work out of a check book. I always did before marriage, still do. It is in the testimony here of Mrs. Simons.

Mr. Greene: Just answer the question. What books do you use?

The Witness: I have a check book in which I make a memorandum of every check I pay out, what it is for, in detail; I mark on every check received what it is for, when I received it. At the end of the year I sit down and compile the thing. That is the way it has been done before the separation, from the very inception, which Mrs. Simons testified to at the trial.

Mr. Greene: That is an answer.

Q. Do you have that check book in court?
A. No, I didn't bring the check books.

Mr. Greene: You would need check books for eight years, you would need a trunk load.

The Witness: As God is my judge, you are getting those figures exact to the penny.

Q. Whom else do you do business with?
A. I do business with some 40-odd or more people in the [fol. 446] United States.
Q. Will you name them?
A. Do you want the names?
Q. Yes.
A. In the Northwest I do business with the National Fruit Canning Company, Seattle, Washington. I do business with C. V., Cedargreen; I do business with Dobel Pratt Company in Portland; they also have a branch in Seattle. I do business with B. Berelson, San Francisco. I do business with the Tea Garden Company in San Francisco; I do business with Bowmer Foods in New Orleans. These people can do just what they did before, sir.

Mr. Greene: Just answer questions. Never mind about their subpoenaeing.

The Witness: They don't like their names bandied in court for no purpose.

Mr. Greene: Answer the question.

The Witness: In Jacksonville I do business with Vita Foods. In Orlando, Florida I do business—

By Mr. Mayer:

Q. Mr. Simons, we were getting on with the elucidation with the list of people.
A. Mr. Mayer, you are asking me to names of the concerns. I am trying hard to give you the names of all the people that I have done business with over the years.

[fol. 447] Mr. Greene: Give them as best you recall.

The Witness: They destroy what I built up, for no reason at all.

Q. That was not all, was it, Mr. Simons?
A. That was not—
Q. All right.

A. But let me tell you this.

Mr. Greene: Come on, give us the names.

The Referee: Put a question.

Q. Will you proceed?

A. Where were we?

Q. The last you mentioned was Vita Foods.

A. Juice Industry, in Dunedin, Florida; I have done business with them.

Q. Are these the people you represent or you sell to?

A. They are people that I either sell for or sell to. There are a host of others. You want every one right down; I have to go through every State that I do business with.

The Referee: Would it be proper to call you a commission broker?

The Witness: That is exactly what I am, sir. I think you mentioned that. That is just what I am, sir.

Q. Will you give a complete list to counsel and furnish it to me and we can save the time of the Court.

[fol. 448] Mr. Greene: If your Honor directs, I will, but you can see it have no purpose except to possibly hurt us. We will show you that after the last separation case, because this woman went around to all the customers and subpoenaed—

Mr. Mayer: I object.

Mr. Greene: Don't interrupt.

Mr. Mayer: I will interrupt. Just a minute.

Mr. Greene: For the two years after the trial, we will show you that his income was just cut in half. This woman, who may want to be living like a queen, I don't know what reason, I don't want her to do that again to him. Since it has no particular purpose here, I don't want to be in a position of giving them a list of customers. We are going to give them all the figures on income and he will swear that those are the figures reported to the Government, audited by the Government. Now, nobody can surely in good faith ask for more.

Mr. Mayer: I have the right of cross-examination.

Mr. Greene: You have the right to annoy, too.

The Referee: Proceed with your examination.

Q. What is the next company?

Mr. Greene: I object to any further companies for the [fol. 449] reasons I stated to your Honor.

The Referee: I will let him answer, if he can.

A. The companies, Chicago Certified Products, Geneva, Ohio; I have done business with Fisher Spiegel; in Atlanta, Georgia, I have done business with Capitol Fish Company.

Q. What did you do with the Capitol Fish Company?

A. I sold them about 2000 cans of cherries through a co-broker.

Q. A fish company?

A. Yes; they handle frozen fruits and vegetables.

Q. Go ahead.

A. G. W. Bagwell, in Chattanooga, with M. L. Bagwell, National; American Syrup & Preserving Company, Nashville; with the Goodman Preserving Company in Louisville. There may be more; I could just rack my head if you want me to continue.

Q. All the commissions that you have received from these people are reflected in your check books?

A. Every commission that I ever received.

The Referee: Is the answer yes or no.

The Witness: Will you repeat that again?

Q. All the commissions that you have received from these people are recorded in your check books?

[fol. 450] A. Absolutely.

Q. So that the check books that you referred to would show a complete picture of your business?

A. Absolutely.

Q. These check books are on what bank?

A. The check books? The check books would be on the Chase National Bank.

Q. You did not mention the Chase Bank before when I asked you?

A. Because I have no account with them at the present time.

Q. When did you close that out?

A. That account was closed prior to the end of the year, on my removal to Florida.

The Referee: What year?
The Witness: 1951.

Q. That was after I commenced this action?
A. Some time after that, when I moved to Florida.
Q. Where is that Chase National Bank located, what branch, if you know?
A. 41st Street and Broadway, where I had been banking since before I was married.
Q. Where do you keep your main operating checking account now?
A. The Chase account was transferred to the Miami Beach First National Bank and that is where it is. Just a transfer of funds and a continuation.

[fol. 451] Mr. Greene: You answered.

Q. When did you transfer these funds?
A. These funds were transferred sometime the latter part of or the middle of—sometime around December, completed at the turn of the year.
Q. How much did you transfer?
A. I don't recall the amount offhand because whatever balances there were I sent them there.
Q. Do you have anything here to refresh your recollection?
A. No, I have not.
Q. Can you state approximately how much it was?
A. Whatever the balances were I transferred.
Q. Was it $50,000?
A. I don't recall any figure, what it was.
Q. You have no records with you which would show the amount?
A. I said I have not. The balance was transferred and just started, just transferred and continued.

Mr. Greene. You have answered it. Don't take up too much time.
The Witness: I am sorry.

Q. Do you have any accounts with any brokers, stock brokers?
A. None whatsoever.

Q. Did you have any accounts with any stock brokers?
[fol. 452] A. I don't know—margin accounts?
Q. Any kind of accounts?
A. I haven't had an account with stock brokers—I don't remember when I did.

Mr. Greene: How many years ago?
The Witness: I don't recall.
Mr. Greene: Five, ten?
The Referee: Was it five years?
The Witness: I don't think I have had an account with them in the last year or two, something like that, or three years.

Q. Have you traded in stocks within the last five years?
A. That is possible, yes.
Q. You did trade?
A. Yes.
Q. Do you know who the broker was?
A. I don't recall who it was because it was out of town.

The Referee: It was what?
The Witness: It was in Florida. One of my friends happened to be down there, working there and I gave him my business.

Q. What was the name of the friend?
A. The name of the friend was Sam Williams, who works in New York.
Q. When did you decide to go to Florida?
A. When the doctor told me I had to lay off for six [fol. 453] months or he would not take any responsibility.
Q. What was the date?
A. Sometime in, I think—can I refer?

Mr. Greene: Yes, sure.

Q. Yes.
A. Sometime in August he gave me the first warning, when I got sick again in October he said, "Either do that or there is no use of your coming around to see me."
Q. You decided about October to move?
A. That is right.
Q. Then you ceased operations in your New York office?

A. My health became more important than my business.

Q. Just a moment, I didn't ask you about your health; I asked you when you ceased operations in your New York office.

A. The New York office ceased at the end of the year, but I went away to rest. I cannot answer it in the form in which you asked me.

Q. You actually bought new machinery and new office appliances in December here, did you not?

A. I did not.

Q. Did not buy some new addressograph or typewriter equipment?

A. Not in December.

Q. When did you buy it?

[fol. 454] A. Might have been in September.

Q. Who did you buy it from?

A. From a concern in Times Square, I swapped in an old typewriter for a rebuilt one. I believe it was September or October, somewhere there, prior to my going South.

Mr. Greene: All right, that is an answer.

Q. Do you have any contracts with any of the concerns that you mentioned before?

A. Contracts?

Q. Yes.

A. I don't work under any contracts with any concern that I buy or sell to or from.

Mr. Greene: The answer is either yes or no.

The Witness: No.

Q. What commission do you work on?

A. On a brokerage of three per cent.

Q. Three per cent of the gross sales price of the merchandise involved?

A. That is right, unless there is a co-broker and then it is half of that.

Q. Do you receive monthly or other periodical statements of accounts from the people for whom you work?

A. No, sir.

Q. When they pay you your commissions how do they do it?

A. I send them a slip or they make one up periodically.

Q. How often do you do that?

[fol. 455] A. When I am in town I will do it, at the next first of the month, if I am traveling I will do it when I get back; there is no routine regular manner.

Q. Do you keep copies of them?

A. Not necessarily, no, because I have to do that myself.

Q. Do you keep a record of the information?

A. I have the confirmations and I make a record of the different items. I have done that way before I was separated, too.

Q. Who gives you the confirmation?

A. I typewrite that myself.

Q. What do you do with it?

A. I send a copy to the buyer and a copy to the seller and I have one copy for myself.

Q. You say your income in 1951 was over $50,000?

A. If you will let me have the slip I will give you the exact figure.

Q. Don't you remember?

Mr. Greene: Show him the figures.

The Referee: He wants to refresh his recollection.

The exact amount was $50,168.70 before taxes.

The Referee: Is that net or gross?

The Witness: That was net before taxes.

[fol. 456] The Referee: Net before taxes?

The Witness: That is right. After taxes it was $23,523.97.

Mr. Greene: A little louder and slower.

The Witness: All right. Net before taxes, $50,168.70; after taxes, $23,523.97. That was for 1951.

Mr. Greene: That is an answer.

Q. How do you account for the difference between $23,523, and $50,168?

A. Taxes.

Q. That was all taxes?

A. Yes, sir.

Q. How much commissions were you actually paid in 1951?

A. I have no idea at the moment.

Q. It was considerable?

A. This is the amount less the expenses of doing business.

Q. How much expenses did you have?

A. I don't know offhand, but I can give you some idea of one item.

The Referee: Was the difference between $23,000 and $50,000 all taxes?

The Witness: Yes, sir.

The Referee: Or taxes plus expenses?

The Witness: No, that was all taxes, sir.

The Referee: Taxes—

The Witness: This is an idea, sir (indicating). May I [fol. 457] just—

Mr. Greene: What are you talking about?

The Witness: Never mind.

Mr. Greene: If you will just answer questions we will get along much better.

Q. Are those telephone bills that you have there, Mr. Simons?

Mr. Greene: Answer the question.

A. Yes.

Q. May I see them?

A. Which ones?

Mr. Greene: Whatever you had in your hand.

The Witness: Because of the fact that my business—

Mr. Greene: No, just show what he asked.

The Witness: Here they are. (Producing) Most of them are long distance, because my business in the city was destroyed—

Mr. Greene: You talk too much.

The Witness: I am sorry.

Mr. Greene: We will never get through if you keep making speeches.

The Witness: All right.

By Mr. Mayer:

Q. In 1950 you had an income before taxes of $47,605?
[fol. 458] A. And two cents, that is correct.
Q. Do you recall what your gross commissions were?
A. I do not.

Mr. Greene: What was it after taxes that year?
The Witness: $18,853.57.
Mr. Greene: That is rather a big tax. Why?
The Witness: In—
Mr. Greene: Just give the brief reason.
The Witness: Taxes for a seven-year period, due to unincorporated business taxes assessed against me for a long number of years previous, on a decision, after they had originally said it was not, at a hearing.
Mr. Greene: In brief, did you pay $30,000 in taxes that year out of $47,000?
The Witness: It was under that. The difference between $47,000 and $18,000, that would be about—
Mr. Greene: $29,000, or $28,800, something like that.

By Mr. Mayer:

Q. In 1945 your net after taxes was how much?
A. Net after taxes?
Q. Yes.
A. $15,037.81, and net after taxes for 1945.
[fol. 459] Q. In 1951 how much was your net after taxes?
A. $23,523.97. Do you want the 1946 and the other years?

Mr. Greene: Answer what he asks you.
Mr. Mayer: I think, your Honor, that we will let Mr. Greene proceed at this time, reserving such right—I would like to reserve the right to have further examination. In the interest of time we will let Mr. Greene proceed now.
The Referee: You are finished at this time?
Mr. Mayer: At this time.
Mr. Greene: He may want to ask questions.
The Referee: You are not precluded from a redirect. You are finished at this time with the witness?
Mr. Mayer: Yes, sir.

Cross-examination.

By Mr. Greene:

Q. Now, Mr. Simons, a judgment of separation was entered here on December 4, 1946, is that correct?

A. Yes, sir.

Q. That provided that you pay your wife $500 a month?

A. Yes, sir.

Q. That was reduced by the Appellate Division to $400 [fol. 460] a month?

A. Yes, sir.

Q. Have you paid that $400 a month ever since?

A. Every single time.

Q. Have you paid punctually?

A. I have never been in default.

The Referee: The answer is yes?

The Witness: Yes.

Q. The year before this trial, the last year, in 1945, according to the record, your gross income before taxes was $28,093.79?

A. That is right, sir.

Q. After taxes it was $15,037.81?

A. Exactly right.

Q. We will just go back two more years for the average, then we will stop. In 1943 what was your gross before taxes?

A. $18,850.64.

Q. And after taxes?

A. $11,739.91.

Q. And for 1944 what was your income net before taxes?

A. $26,707.56.

Q. And after taxes?

A. $14,232.94.

Q. For the three years before this separation what was your average income net before taxes?

A. $24,550.67.

Q. And for the three years before the decree what was your net income average after taxes?

[fol. 461] A. $13,670.22.

Q. Now we will come to the time after the separation figures. In 1946, what was your net income before taxes?

A. $15,150.87.

Q. And after taxes?

A. $10,950.70.

Q. For the year 1947 what was the net before taxes?

A. $15,824.35.

Q. And after taxes?

A. $11,060.84.

Q. For the year 1948 what was your net income before taxes?

A. $24,083.22.

Q. And the net after taxes?

A. $15,145.86.

Q. For the year 1949 what was your net income before taxes?

A. $10,164.06.

Q. And your net after taxes?

A. $8,030.16.

Q. For the year 1950 what was your net income before taxes?

A. $48,605.02.

Q. And your net income after taxes for that year?

A. $18,853.57.

Q. As you explained, there were some taxes from prior years which were adjusted?

A. Yes.

Q. For the year 1951 what was your net income before taxes?

A. $50,168.77.

Q. Your net income after taxes?

A. $23,523.97.

Q. In the year when you had your lowest income, in 1949, [fol. 462] when it dropped to $10,000, did you make any application for any reduction?

A. None whatsoever.

Q. For the six years since the separation what was your average net income before taxes?

A. $27,166.05.

Q. As against what average before the separation?

A. $24,550.67.

Q. For a total difference of about $2600 a year before taxes?

A. $2600 is the average difference.

Q. Or we would say a difference of less than $10,000 on your net income?

A. Much less.

Q. For the six year period since the separation what was your average net income after taxes?

A. Since the separation?

Q. Yes.

A. $14,596.18.

Q. As against net average after taxes before the separation of what figure?

A. $13,670.22.

Q. For a difference of less than a thousand dollars?

A. I would say offhand, about.

Q. Less than a thousand dollars?

A. Less than a thousand dollars, $900.

Q. A difference of approximately seven per cent, is that right?

A. Six or seven per cent.

[fol. 463] Q. When you were married where did you live during all the time you were married?

Mr. Mayer: I object.

A. At 69—

(Discussion.)

The Referee: I will take it.

Q. During the time you were married you lived where?

A. During the time and prior to the time I lived at 6910 Yellowstone Boulevard.

Q. During that time and from the time you were married, what rent did you pay?

Mr. Mayer: I object.

The Referee: Allowed.

A. $70 a month.

Q. For the six years after the separation did you continue to live there?

A. I did.
Q. What rent did you pay?
A. I gave an increase.
Q. Altogether?
A. $83.50 a month.
Q. Did that $83.50 include your business rent, too?

The Referee: You only had one place?
The Witness: I only had one place and I worked there, my office.
The Referee: You had no office other than your home?
[fol. 464] The Witness: That is right.

Q. At the time of the separation decree did your wife testify that she could not work?
A. Yes, sir.
Q. Do you know whether she has worked since then?
A. I do know that, about three weeks after.

The Referee: The answer is yes?
The Witness: Yes.

Q. You know she has received an income from there, too?
A. That is right.
Q. You explained the business you are in to us. What has been the condition of your business since May 1951?
A. There has been a most precipitous decline in price and activity, evidenced from Trades publications I sent you.

Mr. Mayer: I move to strike it out.
Mr. Greene: I consent.
The Referee: That is speculative.
Mr. Greene: I consent to the "Trades publications."
The Referee: It is not admissible. It is speculative.

Q. As to your income of 1951, with reference to your 1951 income, how much of that income did you make in the last six months of 1951?

[fol. 465] Mr. Mayer: I object, unless the figures—
The Referee: Objection overruled.
Mr. Mayer: —are going to be produced.

A. In the last six months? In the last three months—

Q. You made nothing in the last three months of 1951?
A. Expenses were greater than income.

Mr. Mayer: I object and move to strike out the conclusion. That is for the Court to decide.
The Referee: Strike out "expenses were greater."

Q. Just tell us what you earned percentagewise in the last three months and the last six months?

Mr. Mayer: I object to that. I think the figures are the best evidence here, they ought to be produced, particularly the check books.
The Referee: Sustained.

Q. Can you tell us the figures you earned, the net income, the last six months of 1951?

Mr. Mayer: I object unless the check books are produced.
The Referee: Allowed.
Mr. Mayer: Exception.

A. The last six months? I would say that in the last six months maybe 30 per cent of the total year's income [fol. 466] were earned in the last six months.

Mr. Mayer: I move to strike out the answer on the ground the witness's own words—
The Referee: I will take it for what it is worth.
Mr. Mayer: Exception.

Q. 70 per cent of your earnings were in the first six months of 1951?
A. That is right, sir.
Q. What has been the situation in your particular business since the early part of 1951?
A. In early 1951 there was a boom in the food business, as well as a boom in other lines, speculative buying due to the Korean war.
Q. What war?
A. The Korean war.

Mr. Mayer: I object. I move to strike it out.
The Referee: There was a boom in business. What caused the boom—strike out that last part.

Q. And since then?

A. Price are below now where they originally started from before the rise.

Q. What is the business situation in your line as affects you right now?

Mr. Mayer: I object; there is no showing that this man [fol. 467] is completely familiar with the business.

Mr. Greene: He has only been there ten years.

The Referee: Objection overruled.

Mr. Mayer: Exception.

A. What is the question, sir?

Q. What is the business situation pertaining to you right now?

A. At a dead standstill.

Q. Due to what?

A. Lack of sales, OPS restricted prices, where they can't afford to buy due to increase costs, can't sell without a loss, due to increase costs, and the general decline in prices, and over-stocking.

Q. Over-stocking?

A. Which was the early part of last year.

Q. How long has that been the situation with you?

A. It has been that way for a period of perhaps four or four and a half months prior to the end of the year.

Q. With reference to the high income proportionately for the years 1950 and 1951, was that due to any one single factor?

A. Yes, sir.

Q. Was it due to something which may not ever happen again?

A. Definitely.

[fol. 468] Q. What was that factor which affected your income for 1950 and 1951?

A. 1950 I made an extraordinarily large sale.

Q. To whom?

A. To Juice Industries, in Dunedin, Florida, which is a subsidiary of Clinton Foods. It was grape juice they were going to use, like orange juice, they were putting out grape. After they made the purchase and signed the contracts for the purchase, they had restrictions the commission imposed,

had no new allocation for any new product, they could not get cans, they found themselves left with this tremendous purchase which they had no use for. I made the commission selling it to them in 1950. They tried to get an allocation.

Q. What did you do then?

A. I had to resell it for them in 1951.

Q. Did you make another commission on reselling?

A. Every time I make a sale I make a commission.

Q. You made a double commission on that big deal?

A. That is right.

Q. Is that something which does not recur?

A. No, sir.

Q. You mean it does or does not recur?

A. It does not.

[fol. 469] Q. That is what gave you this large income for 1950 and 1951?

A. 1951.

Q. Because for the year before that, in 1949, your entire net income before taxes was just about $10,000?

A. That is right.

Q. Do you employ any help in your business?

A. No, sir.

Q. You do all the work yourself?

A. Yes, sir.

Q. Do you travel?

A. Very extensively.

Q. How many weeks or months a year do you travel?

A. I think it is about seven and a half months of the year that I travel now.

Q. How many hours do you put in?

A. From early morning at eight o'clock until eleven o'clock; during the packing season it is later.

Q. How about week-ends?

A. I always do the details on it, my own stenography, and things like that, which takes up time week-ends, Saturdays, Sundays, holidays. Every bit of work I do myself, except the accountant makes the returns.

Q. We come to one factor. What is your present state of health?

A. Very bad.
Q. In what way?

Mr. Mayer: I object to that.
[fol. 470] The Referee: He may answer?
Mr. Mayer: Exception.

A. I suffer from osteomyelitis, which has been giving me considerable trouble. This is a piece of bone extracted (indicating).
Q. I don't want to look at any bones, just tell us briefly.
A. Two years ago.
Q. No, recently.
A. I was instructed by the doctor unless I slowed down and curtailed my activities he would not be responsible, since he warned me time and again.
Q. What is the condition you have to slow down on, tell us.
A. I suffer from high blood pressure and I have sugar in my blood.

Mr. Mayer: I object.
The Referee: Allowed.
Mr. Mayer: Exception.
The Witness: I suffer high blood pressure and I have sugar in my blood. I have also had the second slight case of heart attack due to over work.
The Referee: What?
The Witness: Second slight case of heart attack.

Q. When was the second attack?
A. That was sometime . . .

. . . . . .

[fol. 471] The Witness: I am 53, May 15th.
Q. With all this osteomyelitis you have been able to get married and travel about?
A. Yes, sir.

(Discussion.)

Q. In the year 1950, as I understood the discussion before, you paid an exorbitant or an extraordinarily large amount of income tax?
A. No, I paid an assessment of income tax.

Q. How much was that assessment?
A. I don't recall the individual amounts.
Q. Well, approximately how much was it?
A. I have a total—

Mr. Greene: It is $29,000. Why can't you figure it?
The Witness: The taxes paid in 1950 was about $28,000 and some odd hundred dollars.

Q. That included an assessment from previous years?
A. That is right.
Q. Have you any idea how much that assessment was?
A. No, I have not.

Mr. Greene: Give us the best estimate.
The Witness: I don't know offhand what it was, it was this unincorporated business tax for a period of five years.
[fol. 472] Mr. Greene: So the average would still be the same?
The Witness: Still be the same if you figure it all together.
Mr. Mayer: The average would not be the same.
Mr. Greene: If it is over the same six years it would be.
The Witness: It covers since 1944.
Mr. Greene: 1946.

By Mr. Mayer:

Q. These figures that you gave us showing your net after taxes, those are with respect to the Federal taxes, are they not?
A. All taxes paid.

Mr. Greene: Federal and State.
The Witness: Federal and State is listed in the amount of taxes—
Mr. Greene: You answered.
The Witness: Everything.
Mr. Mayer: Your Honor, may we have an adjourned date determined at this time?
Mr. Greene: I think we ought to finish.
The Referee: For what?
Mr. Greene: For what reason?

Mr. Mayer: For what reason?

• • • • • • • •

[fol. 473] Mr. Mayer: I believe if I am not given the opportunity to get these figures that I will—

The Referee: Are you through with this witness?

Mr. Mayer: I am not through with him.

The Referee: Proceed to interrogate this witness.

Mr. Mayer: I ask for an adjournment at this time, your Honor.

The Referee: I will deny your application at this time. Proceed with this witness.

(Discussion.)

The Referee: I am not going to grant an adjournment in this case. Call the next witness.

Mr. Mayer: May I respectfully ask an adjournment?

The Referee: I will grant no adjournment.

Mr. Mayer: May I have an opportunity to submit a brief?

Mr. Greene: Do you rest? I would like to question Mrs. Simons before they rest.

The Referee: I do not know if you have rested.

Mr. Mayer: I have no further evidence at this time. I do not rest, though.

The Referee: If you have no further evidence, • • •

[fol. 474] • • • resigned or whether your position terminated, you stopped working—

The Witness: September 30, 1951.

Q. Did you prepare this application on September 14, 1951?

A. If it is there, I must have.

Q. Will you look at it, please, and tell me if you did (handing paper to witness)?

A. Yes, that is my signature.

Q. Is that the date?

A. Yes, sir.

Q. After you stopped work did you make application for unemployment insurance?

A. I could not, I was the only employee in the organization.

Q. Did you receive any unemployment insurance?

A. No, sir.

Q. So that you worked for a period of three years until September 30th, 1951?

A. Yes.

Q. And you say your earnings were about $25 a week?

A. $25 a week.

Q. How much cash did you have in the bank in September 1951?

Mr. Mayer: I object.

A. I had practically nothing because of my taxes and rent.

Q. Will you tell us how much you had?

A. I had • • •

[fol. 475]

PLAINTIFF'S EXHIBIT 5

(See opposite) ☞

LAW OFFICES
MILLARD & GREENE

WILLIAM J. MILLARD (1928-1939)
MYRON J. GREENE
MARTIN GREENE

270 BROADWAY, NEW YORK 7
TELEPHONES CORTLANDT 7-6826-7-8

April 3, 1952

Mr. Sol Simons
1110 Venetian Way
Miami Beach, Florida

Re: Simons vs. Simons

Dear Sol:

The order in the above matter was signed by Mr. Justice Aurelio on April 1, 1952. The alimony is increased to $440 per month, effective as of October 11, 1951.

You will start payment at the new rate of $440 per month on April 1, 1952. The arrears, which represent the difference, have been computed up to March 31, 1951 at the sum of $225.32. A check for this amount is payable to Lucy C. Simons. Counsel fee in the sum of $150 is payable to Jerome Mayer, Esq. You can send both these payments to me at your convenience.

In the light of recent telephone conversations which I had with Mr. Jerome Mayer, I am of the opinion that they will appear and contest your divorce action in Florida.

With kind personal regards, I am

Very sincerely yours,

Myron J. Greene

MJG:GT
Air Mail

[fol. 475]

PLAINTIFF'S EXHIBIT 5

ILLINOIS 9-6026

Sol Simons • FOOD PRODUCTS •

69-10 YELLOWSTONE BOULEVARD, FOREST HILLS, LONG ISLAND, N. Y.

CORRESPONDENCE FROM
1110 VENETIAN WAY
MIAMI BEACH, FLA.
TELEPHONE 3-6330

Myron J. Greene, Esq.
c/o Millard & Greene,
270 Broadway,
New York 7, N. Y.

Dear Millard:

I am attaching herewith checks requested as per your letter of April 3rd. Also, a check for an additional $20 due on the April 1st payment.

I would appreciate your advising me the last day that an appeal can be filed against the decision rendered. I am considering appealing from the increase as I feel any payment whatsoever in this matter is a reward to perjury and miscarriage of justice, due to a temperament of a Judge whose decision was not based on facts. This has been my feeling for over 6 years, and I will never rest until I have been vindicated from a false indictment.

The above also applies to the payment to Jerome Mayer since this attorney has made statements to the Court regarding his labor and efforts that are absolutely untruthful.

I note your opinion from your conversation with Mr. Mayer that they will appear to contest my divorce action. I would welcome such an appearance which will afford me the opportunity of presenting the facts again to prove that perjury has been committed.

With kindest regards, and looking forward to a visit from you when time will permit, I remain

Cordially yours,

Sol Simons

SOL SIMONS

[fol. 476]

PLAINTIFF'S EXHIBIT 6

7-80A SM 2-50

DECLARATION OF DOMICILE AND CITIZENSHIP

TO THE STATE AND COUNTY TAX ASSESSOR,

DADE **COUNTY, FLORIDA:**

This is my declaration of Domicile and Citizenship in the State of Florida that I am filing this day in accordance, and in conformity with Chapter 20412 Laws of Florida, Acts of 1941.

I was formerly a legal resident of New York City **(City)**, N. Y. **(State)**

and I resided at 6910 Yellowstone Boulevard **(Street and Number)**. **However, I have changed my domicile to and am and have been a bona fide resident of the State of Florida since** the 19th **day of** November, **19** 51, **and I reside at** 1110 Venetian Way, Miami Beach **(Street and Number)**

Miami Beach **(City)**, Dade **County, Florida, and this statement is to be taken as my declaration of citizenship, actual legal residence and domicile in the State of Florida.**

(Insert here any pertinent facts, such as sale of property or business, or relinquishment of employment at former domicile, removal of family to new domicile, purchase of home, etc.)

I have signed a one-year's lease for my present apartment at 1110 Venetian Way, Miami Beach, Florida, and have become associated with Fruit Sales Corporation, a Florida concern.

DEFENDANT'S EXHIBIT A

employment at former domicile, removal of family to new domicile, purchase of home, etc.)

I have signed a one-year's lease for my present apartment at 1110 Venetian Way, Miami Beach, Florida, and have become associated with Fruit Sales Corporation, a Florida concern.

EXHIBIT A

[fol. 477]

State of Florida, County of Dade
This instrument was filed for record the 10 day of Dec
1951 at 2:38 P.M. and duly recorded in Dom.
Book 42 on Page 564 File No AA 123940
E. R. HEATHERMAN
Clerk Circuit Court
By V. Cooper D.C

I FURTHER CERTIFY that I will register at my local address when the registration books reopen, and comply with all other requirements of a legal resident of this State.

I FURTHER CERTIFY that I have no intention to return to my former domicile, and I intend to remain in Miami Beach (City), Dade County, Florida, permanently.

Sol Simons
(Name)

1110 Venetian Way, Miami Beach
(Address)

Sworn to and subscribed before me this 27th day of November, A. D. 19 51

Notary Public State of Florida at Large

My Commission expires

(To be executed in duplicate and original filed with Clerk Circuit Court)

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RENEWAL

APARTMENT LEASE

THIS LEASE made this 21st day of September A. D., 19 59, by and between SANDPIPER VILLAS, INC., owner and proprietor of the Sandpiper Villas. or C. J. Morris. his duly authorized agent, both of Miami Beach. Dade County, Florida, hereinafter called the Lessor, and Sol Simons. of 1110 Venetian Way, 39 Miami Beach. hereinafter called the Lessee.....

WITNESSETH, That in consideration of the sum of Nine Hundred Dollars paid by the Lessee....., which said sum is hereby acknowledged to have been received as part payment of rents accruing under this lease, and in the further consideration of the covenants, agreements and conditions herein contained, on the part of the Lessee..... to be kept, done and performed, the said Lessor does hereby lease to the Lessee..... Apartment No. 2-B- on the 2nd floor in the 1110 Building. ....., situated 1110 Venetian Way 39 Miami Beach, Florida, with the full understanding that his family consists of three adults and no child and no more.

TO HAVE AND TO HOLD THE SAME for the full term of One Year from the 1st day of Dec. A. D., 195 9, to the 30 day of Nov. 19 60 the said Lessee..... yielding and paying to the Lessor therefor the total rent of Twenty-One Hundred Dollars.

And the said Lessee covenant with the Lessor to pay said rent in advance in monthly payments, the first payment of $200 Dollars on the 1st. day of January A. D., 19 60 which said sum has been paid and acknowledged herein, and the remaining payments as follows, namely:

$200 on the first day of February 1960 and $200 on the first day of each and every month to and including the first day of June 1960, final payment. The sum of $100 paid as inventory deposit on previous lease is hereby transferred to this lease and is so applied as is inventory. Lessor agrees to provide daily maid service, Sundays and Holidays excepted. Lessee agrees to pay for own gas, electricity, phone and laundering of linens.

AND THE SAID LESSEE.... further covenant.... and agree.... not to use nor permit to be used the premises leased for any illegal, immoral or improper purposes; not to make nor permit any disturbance, noise or annoyance whatsoever detrimental to the premises or to the comfort and peace of any of the inhabitants of said building or its neighbors, and particularly, said Lessee.... agree.... that under no circumstances will..... allow or permit their child or children to play in the halls, lobby, porches or stair-cases of said building or in any other way to annoy the tenants of other Apartments, and the Lessor does hereby reserve the right to terminate this lease at any time this condition is permitted to exist; not to assign this lease nor sub-let any part of the premises here leased, except with the written consent of the owner and only at a price which shall be an amount not less than the proportional rate for the full term; not to use said premises for any other purpose than as a private dwelling for the members of his family; to pay the cost of repairing all damage to the apartment occasioned by the Lessee....or any of his family; and especially the cost of removing foreign substances from toilets and sinks.

AND THE LESSEE.... hereby covenant.... and agree.... that if default is made in the payment of rent as above set forth or any part thereof, or if said Lessee.... or his family shall violate any of the covenants, agreements and conditions of this lease, then the Lessee.... shall become a tenant at sufferance, hereby waving all right of notice to vacate said premises, and the Lessor shall be entitled to re-enter and retake possession immediately of the demised premises, and the entire rent for the rental period next ensuing shall at once be due and payable and may forthwith be collected by distress or otherwise as provided by law; and will at the end of h... term without demand quietly and peaceably deliver up possession of said premises in as good condition as they now are (ordinary wear and the decay and damage by fire or the elements only excepted).

SAID LESSEE.... hereby acknowledges receipt of the articles enumerated on the reverse side of this lease

yielding and paying to the Lessor therefor the total rent of twenty-one hundred Dollars.

And the said Lessee covenant with the Lessor to pay said rent in advance in monthly payments, the first payment of $200 Dollars on the 1st. day of January A. D., 1960, which said sum has been paid and acknowledged herein, and the remaining payments as follows, namely:

$200 on the first day of February 1960 and $200 on the first day of each and every month to and including the first day of June 1960, final payment. The sum of $100 paid as inventory deposit on previous lease is hereby transferred to this lease and is so applied as is inventory. Lessor agrees to provide daily maid service, Sundays and Holidays excepted. Lessee agrees to pay for own gas, electricity, phone and laundering of linens.

AND THE SAID LESSEE further covenant and agree not to use nor permit to be used the premises leased for any illegal, immoral or improper purposes; not to make nor permit any disturbance, noise or annoyance whatsoever detrimental to the premises or to the comfort and peace of any of the inhabitants of said building or its neighbors, and particularly, said Lessee agree that under no circumstances will allow or permit their child or children to play in the halls, lobby, porches or stair-cases of said building or in any other way to annoy the tenants of other Apartments, and the Lessor does hereby reserve the right to terminate this lease at any time this condition is permitted to exist; not to assign this lease nor sub-let any part of the premises here leased, except with the written consent of the owner and only at a price which shall be an amount not less than the proportional rate for the full term; not to use said premises for any other purpose than as a private dwelling for the members of his family; to pay the cost of repairing all damage to the apartment occasioned by the Lessee or any of his family; and especially the cost of removing foreign substances from toilets and sinks.

AND THE LESSEE hereby covenant and agree that if default is made in the payment of rent as above set forth or any part thereof, or if said Lessee or his family shall violate any of the covenants, agreements and conditions of this lease, then the Lessee shall become a tenant at sufferance, hereby waving all right of notice to vacate said premises, and the Lessor shall be entitled to re-enter and retake possession immediately of the demised premises, and the entire rent for the rental period next ensuing shall at once be due and payable and may forthwith be collected by distress or otherwise as provided by law; and will at the end of h..... term without demand quietly and peaceably deliver up possession of said premises in as good condition as they now are (ordinary wear and the decay and damage by fire or the elements only excepted).

SAID LESSEE hereby acknowledges receipt of the articles enumerated on the reverse side of this lease and by agreement made a part hereof and further covenants and agrees to assume full responsibility for said articles and to make good any damage or deficiency therein at the expiration of this lease; to return all linens clean and pay for cleaning of same upon termination of lease.

No Pets permitted on premises.

And the Lessor, upon performance of the said covenants, agreements and conditions by said Lessee hereby covenants that the said Lessee shall have the quiet and peaceable enjoyment of said premises, herein reserving the right to inspect said premises so often as shall be deemed necessary and to show the apartment at reasonable hours to prospective tenants during the thirty days next prior to the expiration of this lease.

Witness our hands and seals this 21st. day of September A. D., 1959,

Signed and sealed in the presence of:

SANDPIPER VILLAS, INC. (Seal)
Lessor

C. J. Morris (Seal)
Agent for Lessor.

(Seal)
Lessee.

Sol Simons (Seal)
Lessee.

APARTMENT LEASE

THIS LEASE, made this 17th day of November A. D., 1951, by and between Sandpiper Villas Inc., owner and proprietor of the Sandpiper Villas or his duly authorized agent, both of Miami Beach, Dade County, Florida, hereinafter called the Lessor, and Sol Simons of 69-10 Yellowstone Blvd Forest Hills L.I. hereinafter called the Lessee.

WITNESSETH, That in consideration of the sum of Ten ---------- Dollars paid by the Lessee, which said sum is hereby acknowledged to have been received as part payment of rents accruing under this lease, and in the further consideration of the covenants, agreements and conditions herein contained, on the part of the Lessee to be kept, done and performed, the said Lessor does hereby lease to the Lessee Apartment No. 2-L on the second floor in the 1110 Building, situated 1110 Venetian Way Miami Beach, Florida, with the full understanding that his family consists of two adults and 10 children and no more.

TO HAVE AND TO HOLD THE SAME for the full term of One Year from the First day of December A. D., 1951, to the 30th day of Nov., 1952, the said Lessee yielding and paying to the Lessor therefor the total rent of Twenty-One Hundred Dollars.

And the said Lessee covenant with the Lessor to pay said rent in advance in monthly payments, the first payment of 900.00 Dollars on the 17th day of Nov. A. D., 1951, which said sum has been paid and acknowledged herein, and the remaining payments as follows, namely:

200.00 the first of each month starting Jan.1st,1952 to and including June 1st,1952.

The sum of $100.00 as inventory deposit on furniture, fixtures and equipment for the apartment is hereby paid and acknowledged.

Lessee agrees to pay for gas, electricity, laundry and telephone for the apartment.

Lessor will furnish maid service daily except Sundays and holidays.

AND THE SAID LESSEE further covenant and agree not to use nor permit to be used the premises leased for any illegal, immoral or improper purposes; not to make nor permit any disturbance, noise or annoyance whatsoever detrimental to the premises or to the comfort and peace of any of the inhabitants of said building or its neighbors, and particularly, said Lessee agree that under no circumstances will he allow or permit their child or children to play in the halls, lobby, porches or stair-cases of said building or in any other way to annoy the tenants of other Apartments, and the Lessor does hereby reserve the right to terminate this lease at any time this condition is permitted to exist; not to assign this lease nor sub-let any part of the premises here leased, except with the written consent of the owner and only at a price which shall be an amount not less than the proportional rate for the full term; not to use said premises for any other purpose than as a private dwelling for the members of his family; to pay the cost of repairing all damage to the apartment occasioned by the Lessee or any of his family; and especially the cost of removing foreign substances from toilets and sinks.

AND THE LESSEE hereby covenant and agree that if default is made in the payment of rent as above set forth or any part thereof, or if said Lessee or his family shall violate any of the covenants, agreements and conditions of this lease, then the Lessee shall become a tenant at sufferance, hereby waiving all right of notice to vacate said premises, and the Lessor shall be entitled to re-enter and retake possession

[fol.

ments, the first payment of $900.00 Dollars on the 17th day of NOV. A. D., 1951, which said sum has been paid and acknowledged herein, and the remaining payments as follows, namely:
$200.00 the first of each month starting Jan.1st,1952 to and including June 1st,1952.
The sum of $100.00 as inventory deposit on furniture, fixtures and equipment for the apartment is hereby paid and acknowledged.
Lessee agrees to pay for gas, electricity, laundry and telephone for the apartment.
Lessor will furnish maid service daily except Sundays and Holidays.

AND THE SAID LESSEE.... further covenant.... and agree.... not to use nor permit to be used the premises leased for any illegal, immoral or improper purposes; not to make nor permit any disturbance, noise or annoyance whatsoever detrimental to the premises or to the comfort and peace of any of the inhabitants of said building or its neighbors, and particularly, said Lessee.... agree.... that under no circumstances will he.... allow or permit their child or children to play in the halls, lobby, porches or stair-cases of said building or in any other way to annoy the tenants of other Apartments, and the Lessor does hereby reserve the right to terminate this lease at any time this condition is permitted to exist; not to assign this lease nor sub-let any part of the premises here leased, except with the written consent of the owner and only at a price which shall be an amount not less than the proportional rate for the full term; not to use said premises for any other purpose than as a private dwelling for the members of his family; to pay the cost of repairing all damage to the apartment occasioned by the Lessee....or any of his family; and especially the cost of removing foreign substances from toilets and sinks.

AND THE LESSEE.... hereby covenant.... and agree.... that if default is made in the payment of rent as above set forth or any part thereof, or if said Lessee.... or his family shall violate any of the covenants, agreements and conditions of this lease, then the Lessee.... shall become a tenant at sufferance, hereby waiving all right of notice to vacate said premises, and the Lessor shall be entitled to re-enter and retake possession immediately of the demised premises, and the entire rent for the rental period next ensuing shall at once be due and payable and may forthwith be collected by distress or otherwise as provided by law; and will at the end of the.... term without demand quietly and peaceably deliver up possession of said premises in as good condition as they now are (ordinary wear and the decay and damage by fire or the elements only excepted).

SAID LESSEE.... hereby acknowledges receipt of the articles enumerated on the reverse side of this lease and by agreement made a part hereof and further covenants and agrees to assume full responsibility for said articles and to make good any damage or deficiency therein at the expiration of this lease; to return all linens clean and pay for cleaning of same upon termination of lease.

NO DOGS SHALL BE PERMITTED ON THE PREMISES.
The use of the swimming pool is limited to the occupants of the apartment (s) and two adult guests and no more.

And the Lessor, upon performance of the said covenants, agreements and conditions by said Lessee.... hereby covenants that the said Lessee.... shall have the quiet and peaceable enjoyment of said premises, herein reserving the right to inspect said premises so often as shall be deemed necessary and to show the apartment at reasonable hours to prospective tenants during the thirty days next prior to the expiration of this lease.

Witness our hands and seals this 17th day of NOV. A. D., 1951.

Signed and sealed in the presence of:

SANDPIPER VILLAS INC. (Seal)
Lessor.

Philip Schneider (Seal)
Agent for Lessor.

Sol Simons (Seal)
Lessee.

(Seal)
Lessee.

CLERK'S NOTE. Similar leases for the intervening years were executed and were introduced in evidence.

[fol. 479]

Milton re: Phelps

ILLINOIS 9-6026

Sol Simons • FOOD PRODUCTS •

69-10 YELLOWSTONE BOULEVARD, FOREST HILLS, LONG ISLAND, N.Y.

1/4/52

Dear Seymour—

Will be back at Miami Sat 1/9th and see you thereafter—and tell you about the Learing— (looks good)

Aunt Sadie Fischer is at my place now if you want to see or chat with her— 3-6330—

Regards—

Sol

DS:L

[fol. 480]

DEFENDANT'S EXHIBIT C

and see you thereafter - and tell you about the
Leaving - (looks good)

Aunt Sadie Fischer is at
my place now if you want to see or
chat with her - 3-6330 -

Regards —

Sol

P.S. - Mr. Stolnick at Warnaco - looking for a house - if cheap will Lease another man (Nathan Karganant) who wants to buy 8 or 10 Unit apt.

Yours Sallmanac

Sa



THE Conrad Hilton



CONRAD N. HILTON, President — ROBERT P. WILLIFORD, Exec. Vice President

CHICAGO • A HILTON HOTEL • WAbash 2-4400

ROBERT P. QUAIN, General Manager

2/28/52

Dear Seymour—

Your enclosure received — it sounds like the Fleetwood to me - from what is offered — or somewhat "White Elephant" of that type — This is their only way out — with Motels Killing Hotels etc + rates down = but not Kitchens or living - Bedroom — as I suggested — This is Club-Residence — not family Type —

Next Sam Kreutzer (counsel records) Motion to confirm Weil's finding was argued at 10 AM 2/28 To-day in Ny. — don't know results. I will advise when notified

It was suggested - that Paragraph 7 - next to last line - after the word requirements - to be inserted - (and beyond

[illegible] and for obstructionistic etc.

[101.451]

DEFENDANT'S EXHIBIT D

CONRAD N. HILTON, Presid[illegible] ROBERT P. WILLIFORD, Exec. Vice President
CHICAGO • A HILTON HOTEL • WAbash 2-4400
ROBERT P. QUAIN, General Manager

1/28/52

Dear Seymour—

Your enclosure seems — it sounds like the Fleetwood to me - from what is offered — or somewhere "White Elephant" of that type - This is their only way out — with Motels Killing Hotels etc & rates down = but not Kitchens or living - Bedroom — as I suggested — This is Club Residence — not family Type —

Mex Sam Kreutzer (counsel requested) Motion to confirm Uhl's finding was argued at 10 AM 1/28 To-day in Ny. — don't know results & will advise when notified

It was suggested - that Paragraph 7 - next to last line - after the word requirements - to be inserted - (and beyond the plaintiff's means) and for redetermination etc - etc —

(over)

"WORLD'S LARGEST AND FRIENDLIEST HOTEL"

[fol. 481]

DEFENDANT'S EXHIBIT D

Here until 3/6 or 3/7. then My - will phone them - advising My result etc —

Want to talk to you about how well for you to get up when I reach Miami -

Got permission to outlet Jones Hills - letter with me when I get to M.B.

Have a grand idea to discuss with you. re Canada Day —

Do a chap named Lazament visit with you ?.

Regards

Sol

[10.482]

OFFICE COPY

DATE 2-13-52 | CARD PREFIX TB | CARD NUMBER 59-08-20

CREDIT CARD ISSUED BY Esso

SOLD TO Sol Simons

STREET 6910 Yellowstone

CITY AND STATE Forest Hills N.Y.

MAKE OF CAR Ford | LICENSE NUMBER 55-91

Merchandise Received. Purchaser authorizes the amount of this invoice to be CHARGED to his account.

SIGNED Sol Simons

BY

		Gals.	Price	Amount
GASO	☐ CROWN EXTRA ☐ CROWN	14.5	31.3	4 50
MOTOIL	☐ ESSO ☐ MOBILOIL ☐ ESSO EXTRA ☐ KYSO			
				4 50

No. KG 96959 Z | TOTAL 4 50

STATION PENNINGTON SERVICE STATION 115-19

DEALER'S NAME AND ADDRESS: W. BROAD & BAY STS. SAVANNAH, GA.

STANDARD OIL COMPANY

Form 088 - 4155 INCORPORATED IN KENTUCKY 6D13188

OFFICE COPY

DATE 3-1-52 | CARD PREFIX TB | CARD NUMBER 5908 YD

CREDIT CARD ISSUED BY ESSO

SOLD TO Sol Simons

STREET 6910 Yellowstone Blvd

CITY AND STATE Forest Hills N.Y.

MAKE OF CAR | STATE | LICENSE NUMBER

Merchandise Received. Purchaser authorizes the amount of this invoice to be CHARGED to his account.

SIGNED Sol Simons

BY

		Gals.	Price	Amount
GASO	☐ CROWN EXTRA ☐ CROWN	9.6		6
MOTOIL	☐ ESSO ☐ MOBILOIL ☐ ESSO EXTRA ☐ KYSO			
				6

No. KF 33629 X | TOTAL 6

STATION STAMP OR DEALER'S NAME AND ADDRESS

ALLIANCE STD. SERV. I-5
16th and MAIN STS.
PHONE 6-9222

STANDARD OIL COMPANY

Form 088 - 4155 INCORPORATED IN KENTUCKY 3D4CE

D-21848
(GEN-MKT) 2-3-52

SERVICE STATION DEALER'S DELIVERY TICKET DATE 3-13-52

CARD PREFIX	CARD NUMBER	VEHICLE LICENSE NO.
TB	59-08-20	55 91

SOLD TO NAME & ADDRESS (PLEASE PRINT): Sol Simons 6910 Yellowstone Blvd Forest Hills N.Y.

RECEIVED QUANTITY SHOWN HEREON

Sol Simons

PURCHASER

ITEM	QUAN.	PRICE	AMOUNT
	6		

[fol. 483]

OIL ☐ ESSO EXTRA ☐ KYSO

No. KG 96959 Z TOTAL 4 50

STATION PENNINGTON SERVICE STATION 115-19

DEALER'S NAME AND ADDRESS: W. BROAD & [illegible] STS. SAVANNAH, GA.

STANDARD OIL COMPANY

Form 068 - 4135 INCORPORATED IN KENTUCKY 9013183

OIL ☐ ESSO EXTRA ☐ KYSO

No. KF 33629 X TOTAL 7

STATION STAMP OR DEALER'S NAME AND ADDRESS

BALIANCE STD. SERV. I-S
16th and MAIN STS.
PHONE 6-9222

STANDARD OIL COMPANY

Form 068 - 4135 INCORPORATED IN KENTUCKY

D-21848
(GEN-MKT) 2-3-52

SERVICE STATION
DEALER'S DELIVERY TICKET DATE 3-13-52

CARD PREFIX	CARD NUMBER	VEHICLE LICENSE NO.
TB	96-0820	S S 91

SOLD TO NAME & ADDRESS (PLEASE PRINT): Sol Lyons 6710 N. Stevens Creek Blvd. Forest Hill, N.Y.

RECEIVED QUANTITY SHOWN HEREON

PURCHASER

ITEM	QUAN.	PRICE	AMOUNT
ESSO EXTRA ☐ ESSO ☐	152		487
ESSO EXTRA MOTOR OIL ☐ ESSO MOTOR OIL ☐			40
		TOTAL	527
TC 950759			
		TOTAL	527

SOLD BY ESSO DEALER

DEALER'S NAME AND ADDRESS: [illegible] Service, Inc. Tom Burton, Pres.

Applicable Federal Excise and State motor fuel tax included in price. Liability thereby has been assumed, and will be paid as required by law. Purchaser is warned that it is dangerous to use Kerosene in starting fires. Esso and Esso Extra must not be sold except as Motor Fuel. Gasoline and Naphtha are not sold for blending purposes. All articles covered hereby meets U. S. Motor Specifications.

[fol. 483]

DEFENDANT'S EXHIBIT E

GULF OIL
PRODUCTS . DATE 2-17-52

PLEASE COPY NUMBER FROM CREDIT CARD ACCURATELY IN LARGE PRINT

CUST. NO. 248-8020 | CARD NO. 1

IF NOT GULF CREDIT CARD SHOW NAME OF ISSUING CO.

SOLD TO J. L. SIMONE

PRINT CUSTOMER'S NAME HERE EXACTLY AS SHOWN ON CREDIT CARD

CITY AND STATE Forest Hills, L. I.

LIC. NO. 41 NY COMPANY CAR NO.

RECEIVED BY X

PRODUCT	QUAN	PRICE	STATE TAX	AMOUNT
THAT GOOD GULF GASOLINE				
GULF NO-NOX GASOLINE	4.9			1 53
GULFPRIDE				
GULFLUBE				
GULFLEX				

THE AMOUNTS SHOWN HEREON INCLUDE ALL APPLICABLE MOTOR FUEL TAXES (FEDERAL, STATE, DISTRICT OF COLUMBIA) NOW IN EFFECT, WHICH WILL BE PAID ON OR BEFORE DUE DATE REQUIRED BY LAW. TOTAL 1 53

STATION NUMBER OR DEALER'S NAME AND ADDRESS

Jackson's Gulf Service
[illegible] Lombardy St.
Richmond, Va.

GULF OIL
PRODUCTS . DATE 2-17-52

PLEASE COPY NUMBER FROM CREDIT CARD ACCURATELY IN LARGE PRINT

CUST. NO. 248-8020 | CARD NO.

IF NOT GULF CREDIT CARD SHOW NAME OF ISSUING CO.

SOLD TO J. L. Simone

PRINT CUSTOMER'S NAME HERE EXACTLY AS SHOWN ON CREDIT CARD

CITY AND STATE Forest Hills, N. Y.

LIC. NO. 559 NY COMPANY CAR NO.

RECEIVED BY X

PRODUCT	QUAN	PRICE	STATE TAX	AMOUNT
THAT GOOD GULF GASOLINE				
GULF NO-NOX GASOLINE	15.7			4 48
GULFPRIDE	14			2 21
GULFLUBE				
GULFLEX	1			1 50

THE AMOUNTS SHOWN HEREON INCLUDE ALL APPLICABLE MOTOR FUEL TAXES (FEDERAL, STATE, DISTRICT OF COLUMBIA) NOW IN EFFECT, WHICH WILL BE PAID ON OR BEFORE DUE DATE REQUIRED BY LAW. TOTAL 7 13

STATION NUMBER OR DEALER'S NAME AND ADDRESS

6 426 77 MIAMI BEACH 5TH ST. & WEST AVE.

[fol. 484]

"T. C. BODY FILE"

MAKE	BODY	MOTOR NUMBER	TITLE NUMBER
CADL	4D8ED	50628[illegible]27	2947596

MODEL AND	DETAIL	NUMBER
6219	50628[illegible]27	

YR MK	CYLS	WHLS	USE	STATE PARTY. REG.	CTY
50	08		PVT	N Y	01

THE WORD "USE" IN USE BLOCK INDICATES THAT THIS VEHICLE HAS PREVIOUSLY BEEN USED AS A TAXICAB, LIVERY, IT, OR FOR HIRE.

NON-NEGOTIABLE

REGISTERED OWNER (LAST NAME FIRST)

SIMONS SOL
1110 VENETIAN WAY
MIAMI BCH FLA

DATE OF ISSUE MO. 4 DAY 16 YR. 52

1ST LIEN HOLDER

DATE OF LIEN MO. DAY YR.

AMOUNT OF LIEN

2ND LIEN HOLDER

DATE OF LIEN MO. DAY YR.

AMOUNT OF LIEN

3RD LIEN HOLDER

DATE OF LIEN MO. DAY YR.

AMOUNT OF LIEN

ADDITIONAL LIENS

[fol. 485]

DEFENDANT'S EXHIBIT F

[fol. 486]

Tallahassee, Florida

July 2, 1962

I, Arch Livingston, Motor Vehicle Commissioner of the State of Florida hereby certify that this is a true and correct copy of the original on file in this office.

ARCH LIVINGSTON
MOTOR VEHICLE COMMISSIONER

By /s/ I. D. SMITH
I. D. Smith
Assistant Commissioner
Motor Vehicle Department

MVC Form 82 (Revised 8-51) 14

2947596

Certificate N _____

CERTIFICATE OF TITLE APPLICATION

STATE OF FLORIDA

MVC USE ONLY

C	MO	ACK	SCK	FCK

T 1 L P R O

Name (Print or Type) Sol Simons

Street No. or P.O. Box 1110 Venetian Way

City or Town Miami Beach 39, County Dade, Florida

hereby states that he, she, or it is the lawful owner or purchaser of the following described motor vehicle and makes application for a Certificate of Title to same:

Make Cad Year 1950 Type 4 d sed Model 6219 Wheels _____

Motor No. 5062 83527 Serial No. same Cylinders 8

I (We) acquired vehicle New by purchase (Purchase, Gift, Trade, Inheritance) on the _____ day of

Nov, 1950, from De Angelis Motors

Address New Brunswick N J Fin. Trg No. 3 W

The following is a full statement of all liens, mortgages, or security interests on said Motor vehicle:

MVC USE ONLY

Liens NONE

(NOTE: If there are no liens, the word "NONE" must appear on the above line. If there are any liens, the word "NONE" must not appear, but the following information.)

First Lien	Second Lien
Date _____ 19 Amt. $ _____	Date _____ 19 Amt. $ _____
Kind _____	Kind _____
Lien Holder _____	Lien Holder _____
Address NONE	Address _____

If previously registered outside of Florida: The above vehicle was previously registered on the _____ day of _____, A.D. 19 _____ at _____ County of _____ State of _____

Signature of Owner Sol Simons By _____ (Signature of Person Signing for Owner)

Subscribed and Sworn to Before Me at Miami

in the State of Fla this 18 day of March 19 52

(SEAL)

Notary Public _____ Notary Public, State of Florida at Large

Date Commission expires Commission expires Oct. 27, 1953

DEALER'S CERTIFICATE

I hereby certify that the Motor Vehicle described above is a _____ vehicle, and was acquired by (New or Used)

me from _____ whose address is (Manufacturer, Distributer, or Former Owner)

_____ and that no certificate has previously been issued.

I warrant title and certify that there are no liens other than shown in such application.

By _____ Dealer's License No. _____

Address _____

Title Graded against Body O.K. APR 7 1952

NOT NEGOTIABLE

NON-NEGOTIABLE

MAR 24

2 187586

[fol. 488]

Tallahassee, Florida
July 2, 1962

I, Arch Livingston, Motor Vehicle Commissioner of the State of Florida hereby certify that this is a true and correct copy of the original on file in this office.

ARCH LIVINGSTON
MOTOR VEHICLE COMMISSIONER

BY I. D. Smith
I. D. Smith
Assistant Commissioner
Motor Vehicle Department

FORM DSA 504

LAN-BROWN MOTORS, Inc.

2044 Biscayne Blvd. Telephone 82-1331

MIAMI 37, FLORIDA

3:10 (451)

№ 3813

NAME Sol Simons DATE 3-17-52

ADDRESS 11 10 C.t. 2 PHONES: BUS RES 38350

MODEL 5062 TYPE Sedan SERIAL NO. ENGINE NO.

LICENSE NO. SS 91 MILEAGE 12852 PROMISED ASP Wash

THE REYNOLDS & REYNOLDS CO., CELINA, OHIO — LITHO IN U. S. A.

INVOICE

OPERATION NO.	INSTRUCTIONS:	CHARGE FOR LABOR	CHARGE FOR MAT	AMOUNT
	GASOLINE ☐ WASH			
	LUB. ☐ BLUE CORAL			
	PACK FRT WHEEL BEARINGS			2 10
	CHK & ALIGN FRONT			
	END, align right support			14 00
	ADJ STEERING			
	NOLAN BROWN MOTORS, INC.			
	10-22			
	62.C 1980			

FOREMAN'S O. K.

ESTIMATES ARE FOR LABOR ONLY

MATERIAL ADDITIONAL

IT IS UNDERSTOOD THAT THIS COMPANY ASSUMES NO RESPONSIBILITY FOR LOSS OR DAMAGE BY THEFT OR FIRE TO VEHICLES PLACED WITH THEM FOR STORAGE, SALE, OR REPAIR.

NOLAN-BROWN MOTORS, INC., SHALL NOT BE RESPONSIBLE FOR DAMAGE TO SAID CAR BY COLLISION DURING SUCH BAILMENT

THIS WORK AUTHORIZED BY

TOTAL LABOR ONLY	16 10
TOTAL PARTS	
TOTAL ACCESSORIES	
TOTAL GAS—OIL—GREASE	
TOTAL SUBLET REPAIRS	
TAX	
TOTAL AMOUNT	16 10

[fol. 489]

DEFENDANT'S EXHIBIT G

283

[fol. 489a]

DEFENDANT'S EXHIBIT H

(omitted in printing)

CLERK'S NOTE. Counsel have stipulated that Sol Simons duly organized a corporation under the laws of the State of Florida on the date indicated in the certificate of incorporation, and that thereafter he filed, as president of the corporation, annual reports with the Secretary of State of the State of Florida in which he stated under oath that he was an officer and director of the corporation and that his residence address was 1110 Venetian Way, Miami, Dade County, Florida.

Form 201. Page 1

1951 NEW YORK STATE INCOME TAX RESIDENT RETURN

For the Calendar Year 1951 or Fiscal Period

Begun 195 and Ended 195

1951

Individuals carrying on an unincorporated business within New York State the gross income of which is more than $10,000, or the net income more than $5,000 (or a prorata part thereof for a period less than twelve months) must make additional report thereof on Form 202 and attach to this return

Non-residents must use Form 203

If your income was SOLELY from compensation as an employee, dividends and interest, and if you elect to claim the Optional Deduction in lieu of ALL OTHER DEDUCTIONS, you should use Optional Form 200.

No. 5 COPY

Paid

Paid

PRINT NAME AND ADDRESS. RESIDENCE ADDRESS MUST BE GIVEN

NAME SOL SIMON

(Last name in full — First name in full — middle initials)

RESIDENCE ADDRESS: 1110 VENETIAN WAY-MIAMI BEACH, FLA.

(FORMERLY:- 69-10 [illegible] BLVD.

(No.) FOREST HILLS, L.I. (State)

1 Did you file for 1949? Yes ☐ No ☐

Did you file for 1950? Yes ☐ No ☐ 1a If no return was filed, state reason

2 Did you file from the same address for 1950? Yes ☑ No ☐ 3 If answer to 2 is "No", give address used for 1950 on line below

No. and Street City State

4 Were you married and living with wife (husband)? 4a If so, his or her name and address?

5 Did he or she have separate income? 5a If so, is it included in this return? 6 If "Head of Family" exemption is claimed, explain 7 Number of dependents 7a If 18 years or over, give reason for support 8 Relationship to you of dependents

9 If status in 4, 6, or 7 changed, date and nature

10 Compensation as Employee (Wages, salaries, bonuses, commissions, etc.)

NAME AND ADDRESS OF EMPLOYER	OCCUPATION OR TRADE	SOCIAL SECURITY NUMBER	TOTAL EARNINGS BEFORE DEDUCTIONS
			$
Total (Enter at Item 21, or Item 38, page 2)			$

ATTACH REMITTANCE HERE

CALCULATION OF NORMAL TAX

11	Net Income (Item 37 or Item 47, page 2)	$ 6806 ✓
12	Personal exemption and credit for dependents	1000 ✓
13	Taxable balance (Item 11 minus Item 12)	$ 5806 ✓
14a	Tax at 2% (First $1000, or less of Item 13)	20 ✓
14b	Tax at 3% (2nd and 3rd $1000, of Item 13)	60 ✓
14c	Tax at 4% (4th and 5th $1000, of Item 13)	80 ✓
14d	Tax at 5% (6th and 7th $1000, of Item 13)	100 ✓
14e	Tax at 6% (8th and 9th $1000, of Item 13)	120 ✓
14f	Tax at 7% (All over $9000, of Item 13)	361 ✓ 44 ✓
15	Normal Tax (Total of Items 14a-14f)	$ 3493 ✓ 44 ✓
15a	10 2%	399 ✓ 88 ✓
17	Adjusted Normal Tax of Item 15 (Enter at Item 18)	$ 3593 ✓ 32 ✓

SUMMARY—TOTAL TAX TO BE PAID

18	Normal Tax (Item 17)	$ 3593 ✓ 32 ✓
19	Net Capital Gain Tax (Item 18, page 4)	★
19a	Unincorporated Business Tax (Item 4, Schedule O, page 2, Form 202)	1541 ✓ 65 ✓ ●
20	Total Tax Due (Total of Items 18-19a)	$ 5134 ✓ 85 ✓

Enter total amount paid with return $

MAKE REMITTANCE PAYABLE TO "STATE TAX COMMISSION". The Taxes entered at Items 18 and 19 may be PAID IN FULL at the time this return is filed or MAY BE PAID in installments. The Unincorporated Business Tax (Item 19a) MUST BE PAID IN FULL at the time this return is filed (See instruction 11—4). DO NOT MAIL CURRENCY.

DATE—NUMBER	AMOUNT PAID	BUSINESS TAX	NORMAL TAX

1951 Calendar Year returns are due on or before April 15, 1952; other fiscal year returns, on or before 15th day of fourth month

8 8 30
8 8 30
8 8 30
8 8 30

[fol. 490]

DEFENDANT'S EXHIBIT I

RESIDENCE ADDRESS: 1110 VENETIAN WAY-MIAMI BEACH, FLA.

(FORMERLY:- 69-10 [illegible] BLVD.)

(City) FOREST HILLS, L.I. (State)

If your income was SOLELY from compensation as an employee, dividends and interest, and if you elect to claim the Optional Deduction in lieu of ALL OTHER DEDUCTIONS, you should use Optional Form 200.

Paid

1 Did you file for 1949? Yes ☑ No ☐
Did you file for 1950? Yes ☐ No ☐ 1a. If no return was filed, state reason

2 Did you file from the same address for 1950? Yes ☑ No ☐ 3 If answer to 2 is "No", give address used for 1950 on line below
No. and Street City State

4 Were you married and living with wife (husband)? 4a. If so, his or her name and address?

5 Did he or she have separate income? 5a. If so, is it included in this return? 6. If "Head of Family" exemption is claimed, explain 7. Number of dependents 7a. If 18 years or over, give reason for support 8. Relationship to you of dependents

9 If status in 4, 6, or 7 changed, date and nature

10 Compensation as Employee (Wages, salaries, bonuses, commissions, etc.)

NAME AND ADDRESS OF EMPLOYER	OCCUPATION OR TRADE	SOCIAL SECURITY NUMBER	TOTAL EARNINGS BEFORE DEDUCTIONS
			$
Total (Enter at Item 21, or Item 38, page 2)			$

ATTACH REMITTANCE HERE

CALCULATION OF NORMAL TAX

11.	Net Income (Item 37 or Item 47, page 2)	$ 6[illegible]6	✓
12.	Personal exemption and credit for dependents	1022 00	✓
13.	Taxable balance (Item 11 minus Item 12)	$ [illegible]6	✓
14a.	Tax at 2% (First $1000. or less of Item 13)	20	✓
14b.	Tax at 3% (2nd and 3rd $1000. of Item 13)	60	✓
14c.	Tax at 4% (4th and 5th $1000. of Item 13)	80	✓
14d.	Tax at 5% (6th and 7th $1000. of Item 13)	100	✓
14e.	Tax at 6% (8th and 9th $1000. of Item 13)	120	✓
14f.	Tax at 7% (All over $9000. of Item 13)	361 44	✓
15.	Normal Tax (Total of Items 14a-14f)	$ 3[illegible]1 44	✓
15a.	10%	399 44	
17.	Adjusted Normal Tax of Item 15 (Enter at Item 18)	$ 3593 20	

SUMMARY—TOTAL TAX TO BE PAID

18.	Normal Tax (Item 17)	$ 3593	20
19.	Net Capital Gain Tax (Item 18, page 4)		★
19a.	Unincorporated Business Tax (Item 4, Schedule O, page 2, Form 202)	1541	65 ●
20.	Total Tax Due (Total of Items 18-19a)	$ 5134	85

Enter total amount paid with return $

MAKE REMITTANCE PAYABLE TO "STATE TAX COMMISSION". The Taxes entered at Items 18 and 19 may be PAID IN FULL at the time this return is filed or MAY BE PAID in installments. The Unincorporated Business Tax (Item 19a) MUST BE PAID IN FULL at the time this return is filed (See instruction H—4). DO NOT MAIL CURRENCY.

8<8 30
8<8 30
8<8 30
8<8 30
3593 20

DATE—NUMBER	AMOUNT PAID	BUSINESS TAX	NORMAL TAX

(These spaces for office use only)

1951 Calendar Year returns are due on or before April 15, 1952; other fiscal year returns, on or before 15th day of fourth month after fiscal year.

THIS INFORMATION MUST BE GIVEN - - - Has the Federal Internal Revenue Bureau notified you during 1950 or 1951 that your income has been changed or that additional tax was due for any prior years? Yes ☐ No ☐
If "Yes", attach a statement giving full details and years affected if the information has not previously been furnished.

I (we) hereby certify that this is a true and complete return to the best of my (our) knowledge and belief.

(Signature of taxpayer or agent)

(Signature of taxpayer's wife (husband) if this is a joint return)

Signed in County, New York.

this day of 1952 Address of agent (201-1851)

MEMO. DIVIDENDS ARE NOT FROM BUSINESS ASSETS SO NOT SUBJECT TO UBT

DEFENDANT'S EXHIBIT I

285

Form 201 Page 2

RETURN OF TAXABLE INCOME SUBJECT TO NORMAL TAX

PART 2 — TO BE USED ONLY IF SPECIFIC DEDUCTIONS ARE CLAIMED

[illegible] Part 1 and ignore Part 2

If the 10% Optional Deduction is claimed, fill in Part 2 below and ignore Part 1.

	INCOME	AMOUNT
21.	Total Earnings before deductions Itemize completely at Item 10, page 1	$
22.	Interest on bank deposits, notes, mortgages, corporation bonds, etc	
23	Dividends	58 00
24.	Income from partnerships, estates, and trusts (give name and address) Enter net income (or loss) other than capital gains or capital losses from partnerships, syndicates, pools, or joint ventures. Report distributive share of net capital gain (or loss) at Item 2, Schedule E, page 4	
25	Income (or loss) from business or profession (from Schedule A, Item 26)	6138 76
26	Income (or loss) from rents and royalties (from Schedule B, column 6)	
29.	Other income (describe)	
30.	Total income (Items 21 to 29)	$ 6196 76

[fol. 491]

	DEDUCTIONS		
31a.	Interest on indebtedness (explain in Schedule 1)	$	
31b.	Taxes on real property (explain in Schedule 1)		
31c.	Other taxes (except income taxes) (explain in Schedule 1) Sales	50 00	
31d.	Other deductions (explain in Schedule 1)	4800	
32	Total of Items 31a 31d		$ 4850
33.	Balance (Item 30 minus Item 32)		$ 1346 76
34.	Contributions (Not to exceed 15% of Item 33) (Explain in Schedule 2)		830
35	Balance (Item 33 minus Item 34)		$ 61606 76
36.	Medical expense (explain in Schedule 1) Gross Amount $	Less 5% of Item 35 $	
37.	Net Income (Item 35 minus Item 36) Enter at Item 11, page 1, unless Part 2 below is used		$ 61606 76

SCHEDULE 1 — Explanation of Deductions Claimed in Schedules A and B, Items 31 (a), (b), (c) and (d) and Item 36.

1. Refer to Item No.	2. EXPLANATION	3. AMOUNT	4. Refer to Item No.	5. EXPLANATION	6. AMOUNT
31c	Alimony Paid to Lucy Simms - As Per Court Decree	$ 4800	✓		$

SCHEDULE 2 — Details of Deduction for Contributions (Item 34).

1

SOL SINGER

CHARITABLE CONTRIBUTIONS - 1951

	League for Handicapped Children	$ 10.00
	Jewish Center - Women's Group	25.00
If you	Hebrew Theological College	500.00
this P	Israel Orphan Asylum	20.00
If Inco	Brandeis University Association	100.00
18	Camp Williams	25.00

Report distributive share of net capital gain (or loss) at Item 2, Schedule E, page 4

25.	Income (or loss) from business or profession (from Schedule A, Item 26)	61388 Xw
26.	Income (or loss) from rents and royalties (from Schedule B, column 6)	
29.	Other income (describe)	
30.	Total income (Items 21 to 29)	$ 67286 ✓

[fol. 491]

DEDUCTIONS

31a.	Interest on indebtedness (explain in Schedule 1)	$	
31b.	Taxes on real property (explain in Schedule 1)		
31c.	Other taxes (except income taxes) (explain in Schedule 1) Sales Tax	50 00 ✓	
31d.	Other deductions (explain in Schedule 1)	4800 00 ✓	
32.	Total of Items 31a -31d		$ 4850
33.	Balance (Item 30 minus Item 32)		$ 62436 ✓
34.	Contributions (Not to exceed 15% of Item 33) (Explain in Schedule 2)		830 00
35.	Balance (Item 33 minus Item 34)		$ 61606 ✓
36.	Medical expense (explain in Schedule 1) Gross Amount $ ..... Less 5% of Item 35 $		$ 61606 ✓
37.	Net Income (Item 35 minus Item 36). Enter at Item 11, page 1, unless Part 2 below is used		$ 61606 ✓

SCHEDULE 1 — Explanation of Deductions Claimed in Schedules A and B, Items 31 (a), (b), (c) and (d) and Item 36.

1. Refer to Item No.	2. EXPLANATION	3. AMOUNT	4. Refer to Item No.	5. EXPLANATION	6. AMOUNT
31d	Alimony Paid to Lucy Simons - As Per Court Decree	$ 4800 00 ✓			$

SCHEDULE 2 — Details of Deduction for Contributions (Item 34).

SOL SIMONS

CHARITABLE CONTRIBUTIONS - 1951

	League for Handicapped Children	$ 10.00
	Jewish Center - Women's Group	25.00
If you this I	Hebrew Theological College	500.00
It Incc	Israel Orphan Asylum	20.00
38.	Brandeis University Association	100.00
39.	Camp Williams	25.00
40.	Miscellaneous Religious and Charitable Contributions	150.00
41.		
42.		$ 830.00

43.	Gross business income (from Schedule A, Item 7)	
44.	Gross income from rents and royalties (from Schedule B, column 2)	
45.	Total of Items 38-44 (Gross Income)	$
46.	Optional Deduction—10% of Item 45 (but not to exceed $500.—see Instruction V—Item 46)	
	[illegible] (Item 45 minus Item 46) Enter at Item 11, page 1, unless Part 1 above is used	$

[fol. 492]

SOL SIMONS

STATEMENT OF OPERATIONS - 1951

INCOME

Commissions - Food Products - Broker		$88,757.91

EXPENSES

Traveling expenses, includes travel by rail, plane, auto and hotel expenses while on road	$6,081.34	
Automobile expenses - for use in New York and vicinity	1,394.76	
Rent	1,501.00	
Stenography	588.75	
Postage, Stationery, Circulars, Supplies and Petty Cash Expenses	1,327.57	
Telephone and Telegrams	8,012.33	
Advertising and Association Dues	476.50	
Entertaining Expenses	2,788.34	
Legal and Accounting	4,225.00	
New York Unincorporated Business Tax	1,420.09	
Depreciation on Auto	954.06	
TOTAL EXPENSES		28,769.74
NET INCOME		$59,968.17
ADD: NY UNINCORP BUSINESS TAX		1420.09
		61388.26

Depreciation on Auto
acquired November 16, 1950 - Cost $3,816.26 @ 25% = $954.06

1951 - NEW YORK UNINCORPORATED BUSINESS TAX

(3)

Net Income from Commissions	$ 61,388.26
Less: Salary allowance	5,000.00
	56,388.26
Less: Exemption	5,000.00
	$51,388.26
Tax at 3%	$ 1,541.65

SCHEDULE D — NON-TAXABLE INCOME

Commissions - Food Products - Broker $80,731.91

Traveling expenses, includes travel by rail, plane, auto and hotel expenses while on road 86.081.34
Automobile expenses - for use in New York and vicinity 2,394.76
Rent 1,501.00
Stenography 588.75
Postage, Stationery, Circulars, Supplies and Petty Cash Expenses 1,327.57
Telephone and Telegrams 8,012.33
Advertising and Association Dues 476.50
Entertaining Expenses 2,788.34
Legal and Accounting 4,225.00
New York Unincorporated Business Tax 1,420.09
Depreciation on Auto 954.06

TOTAL EXPENSES 28,769.74

NET INCOME $59,968.17
ADD: NY UNINCORP BUSINESS TAX 1420.09
61388.26

Depreciation on Auto
acquired November 16, 1950 - Cost $3,816.26 @ 25% = $954.06

1951 - NEW YORK UNINCORPORATED BUSINESS TAX

(3)

Net Income from Commissions	$ 61,388.26
Less: Salary allowance	5,000.00
	56,388.26
Less: Exemption	5,000.00
	$51,388.26
Tax at 3%	$ 1,541.65

SCHEDULE D — NON-TAXABLE INCOME
Enter here all income received during the taxable year, not reported on pages 1 and 2 (See Instruction I—paragraph E)

1. DESCRIPTION	2. AMOUNT	3. DESCRIPTION	4. AMOUNT
Interest on Mtge. Bonds	$ NIL		$

FORM 1040
U. S. Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN
FOR CALENDAR YEAR 1952

1952

or taxable year beginning ....., 1952, and ending ....., 19..

Do not write in these spaces
Serial No.
(Cashier's Stamp)

COPY

Name SOL SIMONS
(PLEASE PRINT. If this is a joint return of husband and wife, use first names of both)

HOME ADDRESS 1110 VENETIAN WAY
(PLEASE PRINT. Street and number or rural route)

MIAMI BEACH, FLORIDA
(City, town, or post office) (Postal zone number) (State)

Social Security No. 115-05-6475 Occupation .....

Your exemptions

1. List your name. If your wife (or husband) had no income, or if this is a joint return, list also her (or his) name.
   A Sol Simons
   B .....
   (Your wife's name—do not list if exemption is claimed on another return)

Check below if at the end of your taxable year you or your wife were—
65 or over ☐ Blind ☐
65 or over ☐ Blind ☐

On lines A and B below—
If neither 65 nor blind write the figure 1
If either 65 or blind write the figure 2
If both 65 and blind write the figure 3

Number of exemptions for you 1
Number of her (or his) exemptions ..... —

Name and address if different from yours

C. List names of your children (including stepchildren and *legally* adopted children) with 1952 gross incomes of less than $600 who received more than one-half of their support from you in 1952. See Instructions.
.....
.....
.....
.....
Enter number of children listed ..... —

D. Enter number of exemptions claimed for close relatives listed in Schedule I on page 2 ..... —

E. Enter total number of exemptions claimed in A to D above 1

Your income

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1952, *before payroll deductions*. Persons claiming traveling or reimbursed expenses, see Instructions.

Print Employer's Name	Where Employed (City and State)	Total Wages	Income Tax Withheld
.....	.....	$	$ .....
.....	.....	.....	.....
.....	.....	.....	.....
.....	Enter total →	$	$ .....

3. If you received dividends, interest, or any other income, give details on page 2 and enter the total here ..... $ 52,348 62
4. Add income shown in items 2 and 3, and enter the total here ..... $ 52,348 62

How to figure the tax

(Before figuring your tax, see Schedule J for "Head of Household." If you claim such status, check here ☐.)
IF YOUR INCOME WAS LESS THAN $5,000.—Use the tax table on page 4 *unless you itemize deductions*. The table allows about 10 percent of your income for charitable contributions, interest, taxes, medical expenses, etc. If your deductions exceed 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 3.
IF YOUR INCOME WAS $5,000 OR MORE.—Compute tax on page 3. Use standard deduction or itemize deductions, whichever is to your advantage.

Tax due or refund

5. (A) Enter your tax from table on page 4, or from line 13, page 3. $ 22,918 85
   (B) Enter your self-employment tax from line 35, separate Schedule C. 81 00
   Enter total here → $ 22,999 85
6. How much have you paid on your 1952 income tax?
   (A) By tax withheld (in item 2, above). Attach Original Forms W-2. $ —
   (B) By payments on 1952 Declaration of Estimated Tax (include any overpayment on your 1951 tax not claimed as a refund). 20,000 00
   Enter total here → 20,000 00
7. If your tax (item 5) is larger than payments (item 6), enter *balance of tax due* here. This balance must be paid in full with return ..... $ 2,999 85
8. If your payments (item 6) are larger than your tax (item 5), enter the *overpayment* here .. $ —
   Enter amount of item 8 you want $..... (Refunded) $..... (Credited on 1953 estimated tax)

Do you owe any prior year Federal tax for which you have been billed? (Yes or No) No Is your wife (or husband)

— Please Attach All Original W-2 Forms Here —

DEFENDANT'S EXHIBIT J

[fol. 493]

DEFENDANT'S EXHIBIT J

[fol. 493]

MIAMI BEACH, (City, town, or post office) FLORIDA (Postal zone number) (State)

Social Security No. 115-05-6475 Occupation

Your exemptions

1. List your name. If your wife (or husband) had no income, or if this is a joint return, list also her (or his) name.

A Sol Simons

B

(Your wife's name—do not list if exemption is claimed on another return)

Check below if at the end of your taxable year you or your wife were—

65 or over ☐ Blind ☐

65 or over ☐ Blind ☐

(Name and address if different from yours)

On lines A and B below—
If neither 65 nor blind write the figure 1
If either 65 or blind write the figure 2
If both 65 and blind write the figure 3

Number of exemptions for you 1

Number of her (or his) exemptions ....

C. List names of your children (including stepchildren and *legally* adopted children) with 1952 gross incomes of less than $600 who received more than one-half of their support from you in 1952. See Instructions.

Enter number of children listed ....

D. Enter number of exemptions claimed for close relatives listed in Schedule I on page 2 .....

E. Enter total number of exemptions claimed in A to D above 1

Your income

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1952, *before payroll deductions*. Persons claiming traveling or reimbursed expenses, see Instructions.

Print Employer's Name	Where Employed (City and State)	Total Wages	Income Tax Withheld
		$	$
	Enter total →	$	$

3. If you received dividends, interest, or any other income, give details on page 2 and enter the total here ..... $ 52,348 62

4. Add income shown in items 2 and 3, and enter the total here .... $ 52,348 62

How to figure the tax

(Before figuring your tax, see Schedule J for "Head of Household." If you claim such status, check here ☐.)

IF YOUR INCOME WAS LESS THAN $5,000.—Use the tax table on page 4 *unless you itemize deductions*. The table allows about 10 percent of your income for charitable contributions, interest, taxes, medical expenses, etc. If your deductions exceed 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 3.

IF YOUR INCOME WAS $5,000 OR MORE.—Compute tax on page 3. Use standard deduction or itemize deductions, whichever is to your advantage.

Tax due or refund

5. (A) Enter your tax from table on page 4, or from line 13, page 3 . $ 22,918 85

(B) Enter your self-employment tax from line 35, separate Schedule C. 81 00

Enter total here → $ 22,999 85

6. How much have you paid on your 1952 income tax?

(A) By tax withheld (in item 2, above). Attach Original Forms W-2. $ —

(B) By payments on 1952 Declaration of Estimated Tax (include any overpayment on your 1951 tax not claimed as a refund) . 20,000 00

Enter total here → 20,000 00

7. If your tax (item 5) is larger than payments (item 6), enter *balance of tax due* here. This balance must be paid in full with return ..... $ 2,999 85

8. If your payments (item 6) are larger than your tax (item 5), enter the *overpayment* here .. $

Enter amount of item 8 you want $ (Refunded) $ (Credited on 1953 estimated tax)

Do you owe any prior year Federal tax for which you have been billed? (Yes or No) No Is your wife (or husband) making a separate return for 1952? (Yes or No) — If "yes," write her (or his) name

If you have filed a return for a prior year, state latest year 1951 Where filed? 3rd D. Y. Jacksonville, Fla.

To which director's (formerly collector's) office did you pay amount claimed in item 6 (B), above?

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature of person, other than taxpayer, preparing this return) (Date)

(Name of firm or employer, if any)

(Signature of taxpayer) (Date)

(Signature of taxpayer's wife or husband if this is a joint return) (Date)

To secure split-income benefits, husband and wife must include all their income and, even though only one has income, BOTH MUST SIGN.

— Please Attach All Original W-2 Forms Here —

[fol. 494]

Schedule A.—INCOME FROM DIVIDENDS

Name of corporation issuing (stock)	Amount	Name of corporation issuing (stock)	Amount
As per Schedule	$		$
			Enter total here → $ 6,457.50

Schedule B.—INCOME FROM INTEREST

Name of payer	Amount	Name of payer	Amount
U. S. Treasury Bonds	$ 275.00		$
			Enter total here → 275.00

Schedule C Summary.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION, FARMING, AND PARTNERSHIPS

1. Business profit (or loss) from separate Schedule C, line 23	$ 45,616.12	
2. Farm profit (or loss) from separate schedule, Form 1040F		
3. Partnership, etc., profit (or loss) from Form 1065, Schedule K, Column 3...		
(Partnership name) (Address)		
4. Total of lines 1, 2, 3	$ 45,616.12	
5. Less: Net operating loss deduction (attach statement)		
6. Net profit (or loss) (line 4 less line 5)		45,616.12

Schedule D.—NET GAIN OR LOSS FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

SOL SIMONS

(... Schedule D)

DIVIDENDS - 1952

Hanover Bank		300.00
American Viscose		160.00
Bank of N. Y.		2,250.00
Guaranty Trust Co.		270.00
Grand Union - Pfd.		615.00
" " - Com.		175.00
National Distillers		400.00
Owens, Illinois Glass		200.00
Libby, Owens, Ford Co.		225.00
Celanese Corp.		862.50
Canada Dry Ginger Ale Co.		
TOTAL	$6,457.50	$ 52,348.62

SOL SIMONS

CHARITIES - 1952

Israel Orphan Asylum	$ 25.00
National Children's Cardiac Home of Miami Beach	10.00
Camp Williams	

Name of payer	Amount	Name of payer	Amount
U. S. Treasury Bonds	$ 275.00		$
			Enter total here →	275.00

Schedule C Summary.—PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION, FARMING, AND PARTNERSHIPS

1. Business profit (or loss) from separate Schedule C, line 23	$ 45,626	12
2. Farm profit (or loss) from separate schedule, Form 1040F		
3. Partnership, etc., profit (or loss) from Form 1065, Schedule K, Column 3		
(Partnership name) (Address)		
4. Total of lines 1, 2, 3	$ 45,626	12
5. Less: Net operating loss deduction (attach statement)		
6. Net profit (or loss) (line 4 less line 5)		45,626 12

Schedule D.—NET GAIN OR LOSS FROM SALES OR EXCHANGES OF CAPITAL ASSETS, ETC.

SOL SIMONS

DIVIDENDS - 1952

Hanover Bank	$1,000.00
American Viscose	300.00
Bank of N. Y.	160.00
Guaranty Trust Co.	2,250.00
Grand Union - Prd.	270.00
" " - Com.	615.00
National Distillers	175.00
Owens, Illinois Glass	400.00
Libby, Owens, Ford Co.	200.00
Celanese Corp.	225.00
Canada Dry Ginger Ale Co.	862.50
TOTAL	$6,457.50

SOL SIMONS

Schedule I.—EXEMPTIONS FOR CLOSE RELATIVES—(See Instructions.)

CHARITIES - 1952

Israel Orphan Acylum	$ 25.00
National Children's Cardiac Home of Miami Beach	10.00
Camp Williams	25.00
Coral Gables Synagogue	39.48
Hebrew Theological College of Chicago	500.00
Manhattan Beach Jewish Center	25.00
Sundry Religious and Charitable Cont.	150.00
TOTAL	$ 774.48

List name(s) and relationship to you _____

4. If all of the ... ed "Yes," you may determine your tax as Head of a Household.

ol. 1941]

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SCHEDULE C (Form 1040)
Treasury Department
Internal Revenue Service

PROFIT (OR LOSS) FROM BUSINESS OR PROFESSION 1952

(For Computation of Self-Employment Tax, see Page 3)

For Calendar Year 1952 or taxable year beginning ....., 1952, and ending ....., 195

Name and Address (from Form 1040) Sol Simons, 1110 Venetian Way, Miami Beach, Fla.

(Partnerships and joint ventures should file on Form 1065)

(I) Principal business activity (see instructions) Food Products Broker
(Retail trade, wholesale trade, lawyer, etc.) (Principal product or service)

(II) Business name Sol Simons (III) FICA employer identification number, if any (see instructions) .....

(IV) Business address (see instructions) 1110 Venetian Way, Miami Beach, Florida
(Street and number or rural route) (City, town, post office) (County) (State)

(V) Were you the sole proprietor of this business in 1951? Yes ☑ No ☐. If "No," check whether this business in 1952 became a successor to a corporation ☐, a partnership ☐, another sole proprietorship ☐, or started as an entirely new business ☐. Where applicable, give name of such predecessor .....

Do NOT include cost of goods withdrawn for personal use or deductions not connected with your business or profession

1. Total receipts from business or profession			$
COST OF GOODS SOLD			
2. Inventory at beginning of year	$		
3. Merchandise bought for manufacture or sale			
4. Cost of labor			
5. Material and supplies			
6. Other costs (explain in Schedule C–2)			
7. Total of lines 2 to 6	$		
8. Less inventory at end of year AS PER SCHEDULE ATTACHED			
9. Net cost of goods sold (line 7 less line 8)			
10. Gross profit (line 1 less line 9)			$
OTHER BUSINESS DEDUCTIONS			
11. Salaries and wages not included in line 4	$		
12. Rent on business property			
13. Interest on business indebtedness			
14. Taxes on business and business property			
15. Losses of business property (attach statement)			
16. Bad debts arising from sales or services			
17. Depreciation and obsolescence (explain in Schedule C–1) AS PER SCHEDULE ATTACHED			
18. Repairs (explain in Schedule C–2)			
19. Depletion of mines, oil and gas wells, timber, etc. (submit schedule)			
20. Amortization of emergency facilities (attach statement)			
21. Other business expenses (explain in Schedule C–2)			
22. Total of lines 11 to 21			
23. Enter net profit (or loss) (line 10 less line 22). Also enter on line 24, page 3, and on line 1, Schedule C Summary, Form 1040			$ 45,616 12

Schedule C-1. EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED ON LINE 17

1. Kind of property (if buildings, state material of which constructed). Exclude land and other nondepreciable property	2. Date acquired	3. Cost or other basis	4. Depreciation allowed (or allowable) in prior years	5. Remaining cost or other basis to be recovered	6. Life used in computing depreciation	7. Estimated life from beginning of year	8. Depreciation allowable this year
Automobile	11/16/50	$ 3,816 26	$ 1,033 56	$ 2,782 70	4 yrs.	3	$ 954 06

[fol. 495]

(I) Principal business activity (see instructions) Food Products Broker
(Retail trade, wholesale trade, lawyer, etc.) (Principal product or service)

(II) Business name Sol Simons (III) FICA employer identification number, if any (see instructions)

(IV) Business address (see instructions) 1110 Venetian Way. Miami Beach Florida
(Street and number or rural route) (City, town, post office) (County) (State)

(V) Were you the sole proprietor of this business in 1951? Yes ☒ No ☐. If "No," check whether this business in 1952 became a successor to a corporation ☐, a partnership ☐, another sole proprietorship ☐, or started as an entirely new business ☐. Where applicable, give name of such predecessor

Do NOT include cost of goods withdrawn for personal use or deductions not connected with your business or profession

1. Total receipts from business or profession			$
COST OF GOODS SOLD			
2. Inventory at beginning of year	$		
3. Merchandise bought for manufacture or sale			
4. Cost of labor			
5. Material and supplies			
6. Other costs (explain in Schedule C–2) AS PER SCHEDULE ATTACHED			
7. Total of lines 2 to 6	$		
8. Less inventory at end of year			
9. Net cost of goods sold (line 7 less line 8)			
10. Gross profit (line 1 less line 9)			$
OTHER BUSINESS DEDUCTIONS			
11. Salaries and wages not included in line 4	$		
12. Rent on business property			
13. Interest on business indebtedness			
14. Taxes on business and business property			
15. Losses of business property (attach statement)			
16. Bad debts arising from sales or services			
17. Depreciation and obsolescence (explain in Schedule C–1) AS PER SCHEDULE ATTACHED			
18. Repairs (explain in Schedule C–2)			
19. Depletion of mines, oil and gas wells, timber, etc. (submit schedule)			
20. Amortization of emergency facilities (attach statement)			
21. Other business expenses (explain in Schedule C–2)			
22. Total of lines 11 to 21			
23. Enter net profit (or loss) (line 10 less line 22). Also enter on line 24, page 3, and on line 1, Schedule C Summary, Form 1040			$ 45,616 12

Schedule C-1. EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED ON LINE 17

1. Kind of property (if buildings, state material of which constructed). Exclude land and other nondepreciable property	2. Date acquired	3. Cost or other basis	4. Depreciation allowed (or allowable) in prior years	5. Remaining cost or other basis to be recovered	6. Life used in computing depreciation	7. Estimated life from beginning of year	8. Depreciation allowable this year
Automobile	11/16/50	$ 3,816 26	$ 1,033 56	$ 2,782 70	4 yrs.	3	$ 954 06

Schedule C-2. EXPLANATION OF LINES 6, 18, AND 21

Line or Column No.	Explanation	Amount	Line or Column No.	Explanation	Amount
		$			$

19—16533-2

[fol. 495]

If you owned a business, or practiced a profession, you should fill in separate Schedule C on other side and enter the net profit (or loss) on line 1, Schedule C Summary, page 2, Form 1040.

Separate Schedule C should include income from (1) sale of merchandise, or products of manufacturing, mining, and construction; (2) business service; and (3) professional service. In general, you should report any income in the earning of which you have incurred expenses for material, labor, supplies, and the like. A farmer keeping his books of account on the accrual basis may include the income in such schedule from the sale of products of agriculture in lieu of including such income in Form 1040F.

Principal Business Activity.—The principal business activity is

are deductible if paid or incurred in carrying on a trade or business. Do not include taxes assessed against local benefits of a kind tending to increase the value of the property assessed, as for paving, sewers, etc.

Losses of Business Property.—You may deduct losses of business property by fire, storm, or other casualty, or theft, not compensated by insurance or otherwise and not made good by repairs claimed as a deduction. Attach a statement showing a description of the property, date acquired, cost, subsequent improvements, depreciation allowable since acquisition, insurance, salvage value, and deductible loss.

Bad Debts Arising From Sales or Services.—Include debts, or

SOL SIMONS

Business Address.

STATEMENT OF OPERATIONS - 1952

Total Receipts.

Cost of

INCOME

Commissions - Food Products Broker $73,854.44

EXPENSES

Traveling Expenses, includes travel by air, rail, auto and hotel expenses while on road	$4,239.10
Automobile expenses (nearby traveling)	1,822.46
Rent	1,714.00
Stenography	1,083.80
Postage, Stationery, Circulars, Supplies and Petty Cash Expenses	1,632.30
Telephone and Telegrams	7,370.57
Advertising and Association Dues	534.56
Entertaining Expenses	3,145.82
Legal and Accounting	4,200.00
New York Unincorporated Business Tax	1,541.65
Depreciation on Auto	954.06

TOTAL EXPENSES 28,238.32

NET INCOME $45,616.12

Depreciation on Auto

[fol. 496]

general, you should report any income in the earning of which you have incurred expenses for material, labor, supplies, and the like. A farmer keeping his books of account on the accrual basis may include the income in such schedule from the sale of products of agriculture in lieu of including such income in Form 1040F.

Principal Business Activity.—The principal business activity is

SOL SIMONS

Business Address. Do not use

STATEMENT OF OPERATIONS - 1952

Total Receipts. You should include

INCOME

Commissions - Food Products Broker $73,854.44

EXPENSES

Traveling Expenses, includes travel by air, rail, auto and hotel expenses while on road	$4,239.10
Automobile expenses (nearby traveling)	1,822.46
Rent	1,714.00
Stenography	1,083.80
Postage, Stationery, Circulars, Supplies and Petty Cash Expenses	1,632.30
Telephone and Telegrams	7,370.57
Advertising and Association Dues	534.56
Entertaining Expenses	3,145.82
Legal and Accounting	4,200.00
New York Unincorporated Business Tax	1,541.65
Depreciation on Auto	954.06

TOTAL EXPENSES 28,238.32

NET INCOME $45,616.12

Depreciation on Auto

Acquired Nov. 16, 1950 Cost $3,816.26 @ 25% = $954.06

Installment Sales.—If you use the

Salaries and Wages.—You should

Rent

Interest on business indebtedness.—Interest on business indebtedness to others is deductible. Do not include interest to yourself on capital invested in or advanced to the business.

Taxes on Business and Business Property.—Include taxes paid or accrued on business property or incurred for carrying on your business. Federal import duties and Federal excise and stamp taxes

Bad Debts Arising From Sales or Services.—Include debts, or

Net Operating Loss Deduction.—Any net operating loss deduction should be entered in Schedule C Summary, Form 1040, instead of in this schedule.

16—62133-2

[fol. 496]

291

COMPUTATION OF SELF-EMPLOYMENT TAX
(For old-age and survivors insurance)

Name of self-employed person ..... Sol Simons .....

State nature of business, if any, subject to self-employment tax ..... Food Products Broker .....

24. Net profit (or loss) shown on line 23, page 1	$ 45,616 12	
25. Losses of business property shown on line 15, page 1		
26. Total of lines 24 and 25		$ 45,616 12
27. Less: Net income (or loss) from excluded services or sources included in line 26. Specify excluded services or sources		
28. Net earnings from self-employment (line 26 less line 27)		$ 45,616 12
29. Net earnings (or loss) from self-employment from partnerships, joint ventures, etc. (from column 10, Schedule K, Form 1065)		
30. Total net earnings (or loss) from self-employment (line 28 plus line 29). (If total of net earnings is under $400, do not make any entries below)		$ 45,616 12
31. Maximum amount subject to self-employment tax	$ 3,600 00	
32. Less: Wages paid to you during the taxable year which were subject to withholding for old-age and survivors insurance. (If such wages exceed $3,600, enter $3,600)		
33. Maximum amount subject to self-employment tax after adjustment for wages	$ 3,600 00	
34. Self-employment income subject to tax—Line 30 or 33, whichever is smaller		$ 3,600 00
35. Self-employment tax—2¼ percent of amount on line 34. Enter here and as item 5 (B), page 1, Form 1040		$ 81 00

GPO 16—62883-2

FILL IN ITEMS BELOW BUT DO NOT DETACH

Schedule C-a (Form 1040)
U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

U. S. REPORT OF SELF-EMPLOYMENT INCOME
(For Federal Old-Age and Survivors Insurance)

1952

For calendar year 1952 or fiscal year beginning ....., 1952, and ending ....., 195...

State nature of business subject to self-employment tax ..... Food Products Broker .....

ENTER HERE THE SOCIAL SECURITY ACCOUNT NUMBER OF THE PERSON NAMED BELOW

000	00	0000
115	05	6475

Enter total net earnings from self-employment shown on line 30 above $ 45,616.12

ENTER BELOW, NAME OF SELF-EMPLOYED PERSON AND BUSINESS ADDRESS

24. Net profit (or loss) shown on line 23, page 1	$ 45,616 12	
25. Losses of business property shown on line 15, page 1		
26. Total of lines 24 and 25		$ 45,616 12
27. Less: Net income (or loss) from excluded services or sources included in line 26. Specify excluded services or sources		
28. Net earnings from self-employment (line 26 less line 27)		$ 45,616 12
29. Net earnings (or loss) from self-employment from partnerships, joint ventures, etc. (from column 10, Schedule K, Form 1065)		
30. Total net earnings (or loss) from self-employment (line 28 plus line 29). (If total of net earnings is under $400, do not make any entries below)		$ 45,616 12
31. Maximum amount subject to self-employment tax	$ 3,600 00	
32. Less: Wages paid to you during the taxable year which were subject to withholding for old-age and survivors insurance. (If such wages exceed $3,600, enter $3,600)		
33. Maximum amount subject to self-employment tax after adjustment for wages	$ 3,600 00	
34. Self-employment income subject to tax—Line 30 or 33, whichever is smaller		$ 3,600 00
35. Self-employment tax—2¼ percent of amount on line 34. Enter here and as item 5 (B), page 1, Form 1040		$ 81 00

GPO 16—63330-2

FILL IN ITEMS BELOW BUT DO NOT DETACH

Schedule C-a (Form 1040)
U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

U. S. REPORT OF SELF-EMPLOYMENT INCOME

(For Federal Old-Age and Survivors Insurance)

1952

For calendar year 1952 or fiscal year beginning ....., 1952, and ending ....., 195...

State nature of business subject to self-employment tax ..... Food Products Broker .....

ENTER HERE THE SOCIAL SECURITY ACCOUNT NUMBER OF THE PERSON NAMED BELOW

000	00	0000
115	05	6475

ENTER BELOW, NAME OF SELF-EMPLOYED PERSON AND BUSINESS ADDRESS

SOL SIMONS
(Name)

1110 VENETIAN WAY
ADDRESS (Street and number, or rural route)

MIAMI BEACH, FLORIDA
(City or town, postal zone number) (State)

Enter total net earnings from self-employment shown on line 30 above $ 45,616.12

Enter wages shown on line 32 above $ -

Enter self-employment income shown on line 34 above $ 3,600.00

[fol. 497]

292

ITEMIZED DEDUCTIONS—FOR PERSONS NOT USING TAX TABLE ON PAGE 4 OR STANDARD DEDUCTION ON LINE 2 BELOW— Page 3

If Husband and Wife (Not Legally Separated) File Separate Returns and One Itemizes Deductions, the Other Must Also Itemize

Describe Deductions and state to whom paid. If more space is needed, attach additional sheets.

Contributions	As per schedule	$ 774 48	
	Allowable Contributions (not in excess of 20 percent of item 4, page 1)		$ 774 48
Interest		$	
	Total Interest		
Taxes	N. Y. State income taxes	$ 3,593 20	
	Sales Taxes, etc.	75 00	
	Total Taxes		3,668 20
Losses from fire, storm, or other casualty, or theft		$	
	Total Allowable Losses (not compensated by insurance or otherwise)		
Medical and dental expenses *(if over 65 see Instructions)*		$	
	Net Expenses (not compensated by insurance or otherwise)	$	
	Enter 5 percent of item 4, page 1, and subtract from Net Expenses.		
	Allowable Medical and Dental Expenses. See Instructions for limitation		
Miscellaneous *(See Instructions)*	Alimony payments to Lucy Simons as per Court Decree	$ 5,385 32	
	Total Miscellaneous Deductions		5,385 32
	Total Deductions		$ 9,828 00

TAX COMPUTATION—FOR PERSONS NOT USING TAX TABLE ON PAGE 4

1. Enter amount shown in item 4, page 1. This is your Adjusted Gross Income		$ 52,348 62
2. If deductions are itemized above, enter total of such deductions. If deductions are not itemized *and line 1, above, is $5,000 or more:* (*a*) married persons filing separately enter $500, (*b*) all others enter 10 percent of line 1, but not more than $1,000		9,828 00
3. Subtract line 2 from line 1. Enter the difference here. This is your Net Income		$ 42,520 62
4. Multiply $600 by total number of exemptions claimed in item 1E, page 1. Enter total here		600 00
5. Subtract line 4 from line 3. Enter difference here. (If line 1 includes partially tax-exempt interest, see Instructions)		$ 41,920 62
If line 5 is not more than $2,000 ——		
6. Enter 22.2 percent of amount shown on line 5 and disregard lines 7, 8, and 9		$
If line 5 is more than $2,000 ——		
7. **And you are a single person, a married person filing separately, or a head of household ——** Single persons and married persons filing separately use Tax Rate Schedule I on page 12 of Instructions to figure tax on amount on line 5; heads of household use Tax Rate Schedule II		$ 22,918 85
8. **And you are filing a joint return ——** (*a*) Enter one-half of amount on line 5	$	
(*b*) Use Tax Rate Schedule I on page 12 of Instructions to figure tax on		

[fol. 498]

Interest			
	Total Interest		
Taxes	N. Y. State income taxes	3,593 20	
	Sales Taxes, etc.	75 00	
	Total Taxes		3,668 20
Losses from fire, storm, or other casualty, or theft			
	Total Allowable Losses (not compensated by insurance or otherwise)		
Medical and dental expenses (*if over 65 see Instructions*)			
	Net Expenses (not compensated by insurance or otherwise)		
	Enter 5 percent of item 4, page 1, and subtract from Net Expenses. Allowable Medical and Dental Expenses. See Instructions for limitation		
Miscellaneous (*See Instructions*)	Alimony payments to Lucy Simons as per Court Decree	5,385 32	
	Total Miscellaneous Deductions		5,385 32
	Total Deductions		$ 9,828 00

TAX COMPUTATION—FOR PERSONS NOT USING TAX TABLE ON PAGE 4

1. Enter amount shown in item 4, page 1. This is your Adjusted Gross Income		$ 52,348 62
2. If deductions are itemized above, enter total of such deductions. If deductions are not itemized *and line 1, above, is $5,000 or more:* (*a*) married persons filing separately enter $500, (*b*) all others enter 10 percent of line 1, but not more than $1,000		9,828 00
3. Subtract line 2 from line 1. Enter the difference here. This is your Net Income		$ 42,520 62
4. Multiply $600 by total number of exemptions claimed in item 1E, page 1. Enter total here		600 00
5. Subtract line 4 from line 3. Enter difference here. (If line 1 includes partially tax-exempt interest, see Instructions)		$ 41,920 62
If line 5 is not more than $2,000 ——		
6. Enter 22.2 percent of amount shown on line 5 and disregard lines 7, 8, and 9		$
If line 5 is more than $2,000 ——		
7. **And you are a single person, a married person filing separately, or a head of household ——** Single persons and married persons filing separately use Tax Rate Schedule I on page 12 of Instructions to figure tax on amount on line 5; heads of household use Tax Rate Schedule II		$ 22,918 85
8. **And you are filing a joint return ——**		
(*a*) Enter one-half of amount on line 5	$	
(*b*) Use Tax Rate Schedule I on page 12 of Instructions to figure tax on amount on line 8 (*a*)		
(*c*) Multiply amount on line 8 (*b*) by 2		$
9. If alternative tax computation is made, enter here tax from separate Schedule D		$
Disregard lines 10, 11, and 12, and copy on line 13 the same figure you entered on line 6, 7, 8 (*c*), or 9, unless you used limited deductions		
10. Enter here any income tax payments to a foreign country or U. S. possession (attach Form 1116)	$	
11. Enter here any income tax paid at source on tax-free covenant bond interest		
12. Add the figures on lines 10 and 11 and enter the total here		$
13. Subtract line 12 from line 6, 7, 8 (*c*), or 9. Enter difference here and as item 5 (A), page 1		$ 22,918 85

16—65304-8

[fol. 498]

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1953 DECLARATION OF ESTIMATED INCOME TAX 1953

FORM 1040-ES AND INSTRUCTIONS

1. Purpose of Declaration.—The purpose of the declaration is to provide a basis for paying currently any income taxes due in excess of the tax withheld from wages, salaries, and other payments for personal services. Therefore, declarations are required only from individuals whose wages or other income exceed the amounts specified in Instruction 2.

Every taxpayer must file an annual income tax return after the close of the taxable year. At that time he must pay any balance of tax due on the year's income over and above the total of (*a*) the amount withheld from his wages and (*b*) the amount paid in installments as estimated tax. If he has overpaid his tax, he will be entitled to a refund upon filing his annual return.

2. Who Must Make a Declaration.—A declaration must be made by every citizen or resident of the United States who expects to receive in 1953: EITHER

(*a*) Wages subject to withholding in excess of $4,500 plus $600 for each exemption—for example, $5,100 in case of a single person with no dependents; $5,700 in case of a married man, with no dependents, whose wife has no income; OR

(*b*) Income from all other sources in excess of $100, provided his total income is expected to amount to $600 or more.

Thus, if your 1953 wages subject to withholding are expected to exceed the amounts specified in paragraph (*a*), you are required to file a declaration. If you expect to receive in 1953 any wages not subject to withholding—for example, pay for agricultural labor or domestic service—or any income from dividends, interest, rents, or gains from property transactions or from a business or profession, you must file a declaration if your 1953 income is expected to exceed the amounts specified in paragraph (*b*).

In deciding whether you must file a declaration, you should exclude from your income any items which are exempt from tax, such as combat-zone pay, mustering-out pay, Government contributions to monthly family allowances, social security benefits, and benefits under the Railroad Retirement Act.

These rules apply also to aliens who are residents of Canada, Mexico, or Puerto Rico and whose wages are subject to withholding of U. S. tax, and to aliens who expect to be bona fide residents of Puerto Rico during the entire taxable year. Other nonresident aliens are not required to file declarations.

3. When and Where To File Declaration.—Your declaration must be filed on or before March 15, 1953, or on such later dates as specified in Instruction 6. It should be delivered, or mailed, to the Director (formerly Collector) of Internal Revenue for the district in which you expect to file your 1953 income tax return.

4. Payment of Estimated Tax.—Your estimated tax may be paid in full with the declaration, or in equal installments on or before March 15, 1953, June 15, 1953, September 15, 1953, and January 15, 1954. The first installment must accompany the declaration.

Any credit for overpayment (item 4 of the declaration) may be applied against the first installment. If the credit is larger than the installment, the balance may be applied against the next installment.

If you file an amended declaration after March 15, 1953, the balance shown as item 6 may be paid in full or spread evenly over the remaining installments.

5. Joint Declaration.—A joint declaration may be filed by husband and wife provided they are both citizens or residents of the United States. An amended declaration may be filed jointly by husband and wife even though separate declarations have been filed.

Even though a joint declaration is filed, separate income tax returns may be filed for the taxable year 1953 if desired, in which case the payments of estimated tax may be treated as payments by either the husband or the wife or may be divided between them in any proportion.

6. Changes in Income or Exemptions.—Even though your situation on March 15 is such that you are not required to file a declaration at that time, your expected income or exemptions may change so that you will be required to file a declaration later. In such case the time for filing is as follows: June 15, if the change occurs after March 1 and before June 2; September 15, if the change occurs after June 1 and before September 2; January 15, 1954, if the change occurs after September 1. The estimated tax may be paid in equal installments on the remaining payment dates.

If, after you have filed a declaration, you find that your estimated tax is substantially increased or decreased as a result of a change in your income or exemptions, you should file an amended declaration on or before the next filing date—June 15, 1953, September 15, 1953, or January 15, 1954. An amended declaration should be marked "Amended" and must be filed with the Director (formerly Collector) of Internal Revenue with whom the original declaration was filed.

A declaration or amended declaration which would *otherwise* be due on January 15, 1954, need not be filed if on or before such date (or, in the case of farmers, January 31, 1954) you file your 1953 income tax return and pay in full the *balance of tax due*.

7. Farmers.—If at least two-thirds of your gross income is derived from farming, you may file the declaration on or before January 15, 1954, instead of March 15, 1953. If you wait until January 15, 1954, you must then pay the entire balance of the estimated tax (item 6 of the declaration). However, if farmers file their final tax returns on or before January 31, 1954, and pay the total tax at that time, they need not file a declaration.

8. Fiscal Year.—If you file your income tax return on a fiscal year basis, your dates for filing the declaration and paying the estimated tax will be the 15th day of the last month of the first, second, and third quarters of your fiscal year, and the 15th day of the first month of your next fiscal year.

9. Penalties.—The following penalties are imposed by law: *For failing to file declaration or failing to pay estimated tax.*—Five percent of the unpaid amount of each installment due, plus 1 percent for each month or part of a month (except the first) during which such amount remains unpaid, up to a maximum of 10 percent of the unpaid amount of such installment. *For underestimating tax by more than 20 percent (33⅓ percent for farmers).*—Six percent of the entire shortage in estimate, but not more than the amount by which the estimate falls short of 80 percent of the tax (or, in the case of farmers, 66⅔ percent of the tax). This penalty will not apply if the estimated tax for 1953 is computed on the basis of your 1952 income and your 1953 exemptions, and is paid on time in equal installments or is paid ahead of time (or, in the case of farmers, is paid in full on or before January 15, 1954).

Penalties provided for willful failure to make a return or for willfully making a false return are likewise applicable to declarations.

10. How To Estimate Your Tax for 1953.—The table and computation on the back of this page are presented to assist you in estimating your tax for 1953. Form 1040 and related instructions for 1952 may be used as a guide.

Generally, the amount to be withheld from your wages in 1953 may be estimated by multiplying the amount withheld in your usual payroll period by the number of payroll periods you expect to work during the year.

A special tax treatment is provided for any individual who qualifies as a *"Head of a Household."*

If you are not married (or are legally separated) at the end of your taxable year, you qualify as a "Head of a Household" provided you furnish over half the maintenance of a home which is your principal residence and which, except for temporary absences, you share during the entire taxable year with—

(*a*) Any person for whom you are entitled to an exemption, or

(*b*) Your unmarried child, grandchild, or stepchild, even though such child is not a dependent.

If you are married to a nonresident alien at any time during your taxable year but otherwise meet the tests above, you are considered a "Head of a Household" since you are not permitted to file a joint return.

If your wife or husband (not a nonresident alien) dies during the taxable year, you do not qualify as a "Head of a Household" since in such case you are generally entitled to file a joint return.

[fol. 499]

YOUR COPY OF DECLARATION OF ESTIMATED TAX (Form 1040-ES)

NAME Sol Simons 1953

If this declaration is not for calendar year 1953, show here ending date of your fiscal year ....., 1954

1. Your 1952 Income Tax $ 2,291.85; ESTIMATED Income Tax for 1953 . . .	$ 4000	00	COPY THESE FIGURES

income over and above the total of (*a*) the amount withheld from his wages and (*b*) the amount paid in installments as estimated tax. If he has overpaid his tax, he will be entitled to a refund upon filing his annual return.

2. Who Must Make a Declaration.—A declaration must be made by every citizen or resident of the United States who expects to receive in 1953: EITHER

(*a*) Wages subject to withholding in excess of $4,500 plus $600 for each exemption—for example, $5,100 in case of a single person with no dependents; $5,700 in case of a married man, with no dependents, whose wife has no income; OR

(*b*) Income from all other sources in excess of $100, provided his total income is expected to amount to $600 or more.

Thus, if your 1953 wages subject to withholding are expected to exceed the amounts specified in paragraph (*a*), you are required to file a declaration. If you expect to receive in 1953 any wages not subject to withholding—for example, pay for agricultural labor or domestic service—or any income from dividends, interest, rents, or gains from property transactions or from a business or profession, you must file a declaration if your 1953 income is expected to exceed the amounts specified in paragraph (*b*).

In deciding whether you must file a declaration, you should exclude from your income any items which are exempt from tax, such as combat-zone pay, mustering-out pay, Government contributions to monthly family allowances, social security benefits, and benefits under the Railroad Retirement Act.

These rules apply also to aliens who are residents of Canada, Mexico, or Puerto Rico and whose wages are subject to withholding of U. S. tax, and to aliens who expect to be bona fide residents of Puerto Rico during the entire taxable year. Other nonresident aliens are not required to file declarations.

3. When and Where To File Declaration.—Your declaration must be filed on or before March 15, 1953, or on such later dates as specified in Instruction 6. It should be delivered, or mailed, to the Director (formerly Collector) of Internal Revenue for the district in which you expect to file your 1953 income tax return.

4. Payment of Estimated Tax.—Your estimated tax may be paid in full with the declaration, or in equal installments on or before March 15, 1953, June 15, 1953, September 15, 1953, and January 15, 1954. The first installment must accompany the declaration.

Any credit for overpayment (item 4 of the declaration) may be applied against the first installment. If the credit is larger than the installment, the balance may be applied against the next installment.

If you file an amended declaration after March 15, 1953, the balance shown as item 6 may be paid in full or spread evenly over the remaining installments.

5. Joint Declaration.—A joint declaration may be filed by husband and wife provided they are both citizens or residents of the United States. An amended declaration may be filed jointly by husband and wife even though separate declarations have been filed.

Even though a joint declaration is filed, separate income tax returns may be filed for the taxable year 1953 if desired, in which case the payments of estimated tax may be treated as payments by either the husband or the wife or may be divided between them in any proportion.

6. Changes in Income or Exemptions.—Even though your situation on March 15 is such that you are not required to file a declaration at that time, your expected income or exemptions may change so that you will be required to file a declaration later. In such case the time for filing is as follows: If by any change or the tax due on the year's exemptions, you should file an amended declaration on or before the next filing date—June 15, 1953, September 15, 1953, or January 15, 1954. An amended declaration should be marked "Amended" and must be filed with the Director (formerly Collector) of Internal Revenue with whom the original declaration was filed.

A declaration or amended declaration which would *otherwise* be due on January 15, 1954, need not be filed if on or before such date (or, in the case of farmers, January 31, 1954) you file your 1953 income tax return and pay in full the *balance of tax due*.

7. Farmers.—If at least two-thirds of your gross income is derived from farming, you may file the declaration on or before January 15, 1954, instead of March 15, 1953. If you wait until January 15, 1954, you must then pay the entire balance of the estimated tax (item 6 of the declaration). However, if farmers file their final tax returns on or before January 31, 1954, and pay the total tax at that time, they need not file a declaration.

8. Fiscal Year.—If you file your income tax return on a fiscal year basis, your dates for filing the declaration and paying the estimated tax will be the 15th day of the last month of the first, second, and third quarters of your fiscal year, and the 15th day of the first month of your next fiscal year.

9. Penalties.—The following penalties are imposed by law: *For failing to file declaration or failing to pay estimated tax.*—Five percent of the unpaid amount of each installment due, plus 1 percent for each month or part of a month (except the first) during which such amount remains unpaid, up to a maximum of 10 percent of the unpaid amount of such installment. *For underestimating tax by more than 20 percent (33⅓ percent for farmers).*—Six percent of the entire shortage in estimate, but not more than the amount by which the estimate falls short of 80 percent of the tax (or, in the case of farmers, 66⅔ percent of the tax). This penalty will not apply if the estimated tax for 1953 is computed on the basis of your 1952 income and your 1953 exemptions, and is paid on time in equal installments or is paid ahead of time (or, in the case of farmers, is paid in full on or before January 15, 1954).

Penalties provided for willful failure to make a return or for willfully making a false return are likewise applicable to declarations.

10. How To Estimate Your Tax for 1953.—The table and computation on the back of this page are presented to assist you in estimating your tax for 1953. Form 1040 and related instructions for 1952 may be used as a guide.

Generally, the amount to be withheld from your wages in 1953 may be estimated by multiplying the amount withheld in your usual payroll period by the number of payroll periods you expect to work during the year.

A special tax treatment is provided for any individual who qualifies as a "*Head of a Household.*"

If you are not married (or are legally separated) at the end of your taxable year, you qualify as a "Head of a Household" provided you furnish over half the maintenance of a home which is your principal residence and which, except for temporary absences, you share during the entire taxable year with—

(*a*) Any person for whom you are entitled to an exemption, or

(*b*) Your unmarried child, grandchild, or stepchild, even though such child is not a dependent.

If you are married to a nonresident alien at any time during your taxable year but otherwise meet the tests above, you are considered a "Head of a Household" since you are not permitted to file a joint return.

If your wife or husband (not a nonresident alien) dies during the taxable year, you do not qualify as a "Head of a Household" since in such case you are generally entitled to file a joint return.

YOUR COPY OF DECLARATION OF ESTIMATED TAX (Form 1040-ES)

NAME Sol Simons **1953**

If this declaration is not for calendar year 1953, show here ending date of your fiscal year 1954

1. Your 1952 Income Tax $ 1,271.81; ESTIMATED Income Tax for 1953 . . .	$ 4000	00
2. Estimated Income Tax withheld and to be withheld during entire year 1953		
3. ESTIMATED Tax after deducting estimated tax withheld (item 1 less item 2)	$ 4000	00
4. Less: Credit for 1952 overpayment if credit was elected in item 8, page 1, Form 1040, for 1952	$	
5. If this is an amended declaration, enter payments made on account of prior declarations for this year		
6. Unpaid balance of ESTIMATED Tax (item 3 less the sum of items 4 and 5)	$ 4000	00
7. Amount paid with this declaration. (Read carefully Instruction 4 above)	$ 1000	00

COPY THESE FIGURES ON THE DECLARATION WHICH YOU WILL FILE WITH THE DIRECTOR.

KEEP THIS COPY FOR USE IN MAKING YOUR ANNUAL RETURN.

DETACH AT THIS LINE ↓ AND FILE FORM BELOW WITH THE DIRECTOR

[fol. 496]

YOUR COPY OF DECLARATION OF ESTIMATED TAX (Form 1040-ES)

NAME SOL SIMONS 115-05-6475 1954

1110 [illegible] WAY MIAMI BEACH, FLA.

COPY

If this declaration is not for calendar year 1954, show here ending date of your fiscal year 1955

1. Your 1953 Income Tax $ 30489.82; ESTIMATED Income Tax for 1954 . .		$ 8,000 00
2. Estimated Income Tax withheld and to be withheld during entire year 1954		
3. ESTIMATED Tax after deducting estimated tax withheld (item 1 less item 2) . .		$ 8,000 00
4. Less: Credit for 1953 overpayment if credit was elected in item 8, page 1, Form 1040, for 1953	$	
5. If this is an amended declaration, enter payments made on account of prior declarations for this year		
6. Unpaid balance of ESTIMATED Tax (item 3 less the sum of items 4 and 5) . . .		$ 8,000 00
7. Amount paid with this declaration. (Read carefully Instruction 4)		$ 2,000 00

KEEP THIS COPY FOR USE IN MAKING YOUR ANNUAL RETURN.

CDF—16—60270-1

CLERK'S NOTE. Counsel stipulate that Sol Simons thereafter for each year, up to and including 1960, similarly filed federal income tax returns in the State of Florida with the Director of Internal Revenue, Jacksonville, Florida.

[fol. 500]

295



METROPOLITAN DADE COUNTY · FLORIDA

TAX SECTION
137 COURTHOUSE
MIAMI 32, FLORIDA
FRANKLIN 3-4441

TAX COLLECTION DIVISION

July 19, 1962

THIS IS TO CERTIFY that I, E. W. Wright, Tax Collector in and for Dade County, Florida, am the custodian of the tax rolls and receipts evidencing payment of Dade County Intangible Personal Property Taxes.

I further certify that the Intangible Personal Property Tax covering the years 1953 through 1961 assessed inthe names of Estate of Sol Simons and Sol Simons are a replica of our tax rolls and that the taxes have been paid as indicated below:

Assessment for: Estate of Sol Simons

YEAR	DATE PAID	RECEIPT NO.	NET AMT. PAID
1961	11/8/61	4-2057	$1,229.58

Assessment for: Sol Simons

1960	11/30/60	5-25379	1,547.90
1959	12/28/59	9-38573	1,228.80
1958	11/5/58	3-5512	557.28
1957	11/30/57	4-20805	560.03
1956	11/1/56	2-2973	206.41
1955	11/1/55	4-4034	202.93
1954	11/1/54	8-2100	131.20
1953	11/4/53	6-10692	144.26
1952 (None)			

Certified by:

[fol. 501]

DEFENDANT'S EXHIBIT K

METROPOLITAN DADE COUNTY · FLORIDA

TAX COLLECTION DIVISION

TAX SECTION
137 COURTHOUSE
MIAMI 32, FLORIDA
FRANKLIN 3-4441

July 19, 1962

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1955	11/1/55	4-4034	202.93
1954	11/1/54	8-2100	131.20
1953	11/4/53	6-10692	144.26
1952 (None)			

Certified by:

E. W. Wright
Dade County Tax Collector

[fol. 501]

DEFENDANT'S EXHIBIT K

[fol. 506]

DEFENDANT'S EXHIBIT M

(Correspondence from the files of Sol Simon—omitted in printing)

CLERK'S NOTE. Counsel stipulate that Sol Simons was present at his address at 1110 Venetian Way, Miami, Dade County, Florida, and dictated correspondence to public stenographers between the dates of February 28, 1952 and May 1, 1952.

TEL. LIBERTY 2-0574

DOROTHY NEWHOFF

Public Stenographer

554 OLD SOUTH BUILDING
294 WASHINGTON STREET
BOSTON

Riviera Plaza Hotel
Miami Beach, Fla.

March 26, 1952..

Sol Simons,
1110 Venetian Way,
Miami Beach, Fla.

Stenographic Services (@ 2.00 per hr)

March 24th	1 3/4 hrs	(dictation)
" "	1 1/2 hrs	(transcription)
" 25th	3/4 hrs	
" 26th	1 hr	Total ... 5 hrs

$10.00

Received payment,
Dorothy Newhoff
3/26/52

Thank you

DOROTHY NEWHOFF, Public Stenographer
Miami Beach, Florida

DEFENDANT'S EXHIBIT N

[fol. 507]

" 25th 3/4 hrs
" 26th 1 hr Total ... 5 hrs

$10.00

Received payment,

3/26/52

[fol. 507]

DOROTHY NEUHOFF, Public Stenographer
Miami Beach, Florida

May 2, 1952.

Sol Simons,
1110 Venetian Way,
Miami Beach, Florida

Re: Will (stenographic services)

May 1st, 1952 (evening)	2 hrs @ 3.00	$6.00
" 2nd (transcription)	2 3/4 hrs @ 2.00	5.50
		$11.50

5/7/52 Check #1150 1150

Received payment,

298

DOROTHY NEWHOFF, Public Stenographer
Riviera Plaza Hotel
Miami Beach, Fla.

April 18, 1952.

Sol Simons
1110 Venetian Way,
Miami Beach, Florida.

Stenographic services (@ 2.00 per hr)

April 17th & 18th	10 hrs.	.....	$20.00

Received payment,

4/18/52

MB dk # 1179

20 00

[fol. 509]

DEFENDANT'S EXHIBIT O

(Correspondence from files of Sol Simon—omitted in printing)

CLERK'S NOTE. Counsel stipulate that Sol Simons was present at his address at 1110 Venetian Way, Miami, Dade County, Florida, and dictated correspondence to public stenographers between the dates of March 18, 1952 and April 23, 1952.

35 West 81st
Nycity
Nov. 29, 1957

Dear Sol -

I am sending a copy of this to New York. I dislike writing you again about my check but since I haven't received my Nov. 1st check yet I thought I should let you know in case it has gone astray, or addressed wrongly.

It is as unpleasant for me as for you to have to write you. You date my checks the 1st + 16th but the post-marks on the envelopes are evidence that you mail them on the 13th or 14th, 28th. I need the money badly not only to live on but to pay medical and dental bills. My taxes are about $150.00 and I do not want to annoy you but please see that I receive them on time. When I make my tax payments I attempt the date I receive it each month and besides I get them on time your deductions will not coincide with my payments - also if checks are held up by you it will be more unpleasant to send them all at once if you hold them

up this week. I don't do it as you do deliberately, but rather, someone else does the mailing. I tried to call you at home in Fresno Hills but got no answer.

I know you live ethical about your obligations, and this is a big one and believe me, if I had some money of my own I wouldn't take this - but I need it to live on, and don't want to do anything unpleasant and cause you more hassles.

I do sincerely wish only the best for you and you shouldn't hate me as you do, because you know I sacrificed along with you during bad times.

Please, Sol, see that my checks are mailed a little earlier. By this time my Nov. 15 check is due, in addition to Nov 1st

Sincerely

Lucy

Feel terrible to have to write you.

LAW OFFICES
MILLARD & GREENE

WILLIAM J. MILLARD (1928-1939)
MYRON J. GREENE
MARTIN GREENE

270 BROADWAY, NEW YORK 7
TELEPHONES CORTLANDT 7-6626-7-8

November 19, 1951

[Fol. 512]

DEFENDANT'S EXHIBIT Q

Mr. Sol Simons
Hotel New Yorker
Miami Beach, Florida

Dear Sol:

A hearing in this matter has been set for November 26th at 10:15 A.M.

Please phone me promptly on receipt of this letter for the purpose of discussing the matter.

Very truly yours,

Myron Greene

MJG:GT
Air Mail

LAW OFFICES
MILLARD & GREENE

WILLIAM J. MILLARD (1928-1939)
MYRON J. GREENE
MARTIN GREENE

270 BROADWAY, NEW YORK 7
TELEPHONES CORTLANDT 7-6628-7-8

November 26, 1951

Mr. Sol Simons
1110 Venetian Way
Miami Beach, Florida

Re: Simons vs. Simons

Dear Sol:

We appeared in court today and the hearing in the above matter was adjourned to January 15, 1952. I will have ample occasion to discuss this matter further with you when you are next in New York.

Sincerely yours,

Myron J. Greene

MJG:GT
Air Mail

[fol. 513]

LAW OFFICES
MILLARD & GREENE

WILLIAM J. MILLARD (1926-1939)
MYRON J. GREENE
MARTIN GREENE

270 BROADWAY, NEW YORK 7
TELEPHONES CORTLANDT 7-0626-7-8

November 27, 1951

Mr. Sol Simons
1110 Venetian Way
Miami Beach, Florida

Dear Sol:

Supplementing my letter of yesterday:

As you know, the matter now stands adjourned to January 15, 1952.

The attorney for the other side asked whether we would supply him with data on your earnings for the past three years. His position is that unless we furnish such data, he will be obliged to subpoena all your accounts and banks. I told him that this would be of very little concern to us because neither you nor I are very much influenced by threats of such nature.

This is where the matter stands at the present time and he will wait till the end of the year to hear from me as to my intentions and plans along these lines.

Sincerely yours,

Myron Greene

MJG:GT
Air Mail

BOOK 103 PAGE 577

State of Florida
County of Dade
Filed and recorded
this [illegible]
in PROBATE RECORD,
Book 10 Page 577
FRANK E. DOSLING, County Judge.
By [illegible] Clerk

IN THE COUNTY JUDGES' COURT IN AND FOR DADE COUNTY, FLORIDA.

IN PROBATE NO. 51039-B

IN RE: ESTATE OF

SAUL SIMONS,

Deceased

ELECTION TO TAKE DOWER

LUCY C. SIMONS, the widow of SAUL SIMONS, Deceased, who died while a resident of Dade County, Florida, being dissatisfied with the portion of the estate of her husband to which she is entitled under the will of her husband, does hereby elect to take dower in the estate of her husband as provided by law.

Lucy C. Simons

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS

Lucy C. Simons, appeared before me, the undersigned officer,

DEFENDANT'S EXHIBIT R

[fol. 515]

LUCY C. SIMONS, the widow of SAUL SIMONS, Deceased, who died while a resident of Dade County, Florida, being dissatisfied with the portion of the estate of her husband to which she is entitled under the will of her husband, does hereby elect to take dower in the estate of her husband as provided by law.

Lucy C. Simons

Lucy C. Simons

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS

Lucy C. Simons, appeared before me, the undersigned officer, and stated that the statements contained in the foregoing election are true.

Lucy C. Simons

Lucy C. Simons

Sworn to and subscribed before me this 3rd day of February, 1961.

Lillian M. Rodwig
Notary Public, State of New York

LILLIAN M. RODWIG
Notary Public, State of New York
Qualified in Bronx County
No. 24-0816150
Cert. filed in New York County
Commission Expires March 30, 1962

MARTIN FINE and BERNARD JACOBSON
Attorneys for Lucy C. Simons
14th Floor Dade Federal Building
Miami 32, Florida

By Bernard Jacobson
Bernard Jacobson

[fol. 516]

DEFENDANT'S EXHIBIT S

LAST WILL AND TESTAMENT

of

SOL SIMONS

I, SOL SIMONS, of the County of Dade, the State of Florida, being of sound and disposing mind and memory, do hereby make, publish and declare this to be my Last Will and Testament, and hereby revoke any and all Wills and Codicils heretofore made by me.

ARTICLE I

I direct my Executor to pay all my just debts, funeral expenses and testamentary charges as soon after my decease as may be practical.

ARTICLE II

I hereby nominate, constitute and appoint the MIAMI BEACH FIRST NATIONAL BANK OF MIAMI BEACH, FLORIDA, to be the Executor of and Trustee under this, my Last Will and Testament. I direct that my said Executor and Trustee shall have power and authority to sell any real or personal property belonging to my estate at public or private sale at such price and upon such terms and conditions as in its judgment shall be proper and expedient, without the necessity of obtaining any order of any court therefor. It is my desire that the above Executor and Trustee shall follow a course of investments which shall be hereinafter described. I expressly direct that no bond or other security shall be required in any jurisdiction for any reason whatsoever of my said Executor and Trustee for the faithful performance of its duties hereunder. I request the said Executor and Trustee to retain Seymour B. Liebman, Esq. as its attorney.

ARTICLE III

I give, devise and bequeath any automobile that I may own at the time of my decease to my brother-in-law, MAURICE I. LOMBARD, now residing at 1525 Grand Concourse, New York City, and if there are any storage or any other charges thereon at the time of my decease, the same shall be paid by my Executor.

[fol. 517] ARTICLE IV

I direct that all specific legacies and devices herein shall be free and clear of any estate, inheritance or gift taxes, and that said taxes shall be paid by my Executor out of the residue of my estate.

ARTICLE V

I request my attorney, SEYMOUR B. LIEBMAN, to select and purchase, on behalf of the estate, a burial plot and necessary headstone, giving him full power and authority in connection with this Article.

For reasons known to my attorney, SEYMOUR B. LIEBMAN, I have made no mention of my former wife, LUCY C. SIMONS, from whom I was divorced by the Courts of Florida by decree dated April 30th, 1952.

I have deposited in my vault in the MIAMI BEACH FIRST NATIONAL BANK a sealed envelope containing a letter. This envelope is marked: "Re Lucy C. Simons". In the event the said LUCY C. SIMONS commences any legal action or proceeding concerning my estate, I direct my Executor to open the envelope and file the letter in the probate proceedings. If she does not commence any action or proceedings as aforesaid, then in that event the envelope shall remain unopened and, upon the discharge of the Executor, shall be destroyed.

ARTICLE VI

I give, devise and bequeath to my sister, MILDRED WEISS of Monticello, New York, the sum of ONE THOUSAND ($1,000.00) DOLLARS.

ARTICLE VII

I give, devise and bequeath to each of my dear friends, DR. NORMAN F. LASKY, New York City; DR. MORRIS J. LANGSAM, Flushing, New York City; and to my brother-in-law, DR. A. N. SAPERSTEIN, Bellerose, Long Island, N. Y., the sum of FIVE HUNDRED ($500.00) DOLLARS.

[fol. 518] ARTICLE VIII

All the rest, residue and remainder of my estate, real, personal and mixed, of whatsoever kind, nature or description and wheresoever the same may be situated or located, I give, devise and bequeath to my Trustee, hereinbefore named, IN TRUST, NEVERTHELESS, to hold, receive and dispose of the principal and income thereof as follows:

1. To my aunt, SADIE FISHER, now residing at 240 Kent Lane, Hewlett, Long Island, N. Y., the sum of THREE THOUSAND SEVEN HUNDRED AND FIFTY ($3,750.00) DOLLARS per annum, payable during her life, in quarterly installments commencing on the first day of the month following my decease. This bequest to MRS. SADIE FISHER shall be in full force and effect during the term of her natural life and her interest shall cease on the date of her decease. The interest of SADIE FISHER shall not be subject to any assignment by her or to be pledged by her in any manner, shape or form. This bequest to SADIE FISHER is my gesture of thanks and appreciation for her many, many acts of kindness, her sacrifices made in my behalf, her consideration and thoughtfulness expressed by her during my lifetime.

2. To my sister, ESTELLE J. TREENE, now residing at 69-10 Yellowstone Boulevard, Forest Hills, New York City, the sum of THREE THOUSAND SEVEN HUNDRED AND FIFTY ($3,750.00) DOLLARS per annum, payable during her life, in quarterly installments commencing on the first day of the month following my decease. This bequest to ESTELLE J. TREENE, shall be

in full force and effect during the term of her natural life and her interest shall cease on the date of her decease. The interest of ESTELLE J. TREENE shall not be subject to any assignment by her or to be pledged by her in any manner, shape or form.

3. To MARY L. DOYLE, now residing at 250 Hathaway Avenue, Elmont, Long Island, N. Y., the sum of THREE THOUSAND SEVEN HUNDRED AND FIFTY ($3,750.) DOLLARS per annum, payable during her life, in quarterly installments commencing on the first day of the month following my decease. This bequest to MARY L. DOYLE shall be in full force and effect during the term of her natural life and her interest shall cease on the date of her decease. The interest of MARY L. DOYLE shall not be subject to any assignment by her or to be pledged by her in any manner, shape or form. This bequest to MARY L. DOYLE is in appreciation and gratitude for her many sacrifices in my behalf, as well as her thoughtful consideration in acts that have contributed to my better living and observation of diets plus many other friendly, thoughtful and considerate acts that have made my life very pleasant.

[fol. 519] 4. To my sister, MARTHA LOMBARD, now residing at 1575 Grand Concourse, New York City, the sum of THREE THOUSAND SEVEN HUNDRED AND FIFTY ($3,750.00) DOLLARS per annum; payable during her life, in quarterly installments commencing on the first day of the month following my decease. This bequest to MARTHA LOMBARD shall be in full force and effect during the term of her natural life and her interest shall cease on the date of her decease. The interest of MARTHA LOMBARD shall not be subject to any assignment by her or to be pledged by her in any manner, shape or form.

5. To PATRICIA ANN JULIE, daughter of MICHAEL and HELEN JULIE, now residing at 250 Hathaway Avenue, Elmont, L. I., N. Y., age 5 years old, I direct my Executor to send to her parents or their survivor the sum of ONE THOUSAND ($1,000.00) DOLLARS per annum in quarterly installments which is to be used by them for her education and to purchase for her welfare such items

of clothes or other things in the parents' discretion that would make the child's life more pleasant and happy. This bequest is made in gratitude for the joys and pleasure I have experienced in being with this child and the happiness I have received in lieu of having a child of my own. This sum shall be paid to the parents of PATRICIA ANN JULIE for her welfare until she has reached the age of twenty-one years and shall cease thereafter.

6. To SADIE MINER, now residing at 107-26 125th Street, Richmond Hill, L. I., N. Y., I direct my Executor to pay her the sum of ONE THOUSAND ($1,000.00) DOLLARS per annum during her life, payable in quarterly installments commencing on the first day of the month after my decease. SADIE MINER, for a number of years, has looked after my home as housekeeper in a diligent, trustworthy and excellent manner that relieved me of the burden and details of maintaining a home in a perfect and pleasant atmosphere. My gesture is in appreciation of her personal interest to provide me with the comforts and pleasant surroundings of my home over the many years that she has worked for me. This bequest is to cease at her death, and is not to be subject to any claims or liens of any nature whatsoever.

It is my intention that all of the beneficiaries of the trust fund shall be of equal standing and, in the event the income and principal shall at any time be insufficient to make the full payments as hereinbefore provided, that then [fol. 520] and in that event the payments to each of said beneficiaries shall be reduced in equal proportions.

ARTICLE IX

I authorize, empower and direct my Executor to permit MARTHA LOMBARD and MARY DOYLE to select and take, without any charge whatsoever, my personal effects such as jewelry, household equipment, furniture, bric-a-brac, that I may own at the time of my death, regardless of where it is located. In the event of any dispute between either of said legatees as to any specific article, then and in that event the Executor shall have the sole right and

privilege of designating which legatee shall secure the particular article involved in the dispute.

ARTICLE X.

Provided that the funds in my estate be sufficient to make the payments to the beneficiaries, as set forth in Article VIII, my Executor and Trustee is hereby directed to pay any and all tuition fees while at college or university for each of my nephews, ARTHUR and LAWRENCE LOMBARD and, in addition thereto, during the school year while they are at college or university, TWENTY ($20.00) DOLLARS per week.

ARTICLE XI

There is no provision made in this Will for my brothers, MURRAY SIMONS, JOSEPH SIMONS, HERBERT SIMONS, BERTRAM SIMONS; my sisters, MRS. HANNAH JACOBY, MRS. LOTTIE A. SAPERSTEIN, because during my life they have not expressed any interest in my welfare nor any interest that in normal family life is shown and expressed between brothers and sisters. I have not overlooked them and have deliberately omitted them from any bequest for the reasons stated. Their attitude towards me was in spite of the many generous gestures, favors and acts of kindness and helpfulness that I have shown to them by acts, gifts and personal sacrifices in their behalf during my life. I have made no bequest for my mother, YETTA SIMONS, since she is amply taken care of by her other children.

ARTICLE XII

My Executor and Trustee is hereby authorized, empowered and instructed to make payments over and above any legacy to the beneficiaries named in Article VII hereof, whenever any of the said beneficiaries require surgery or ex- [fol. 521] tended hospitalization or an extended convalescence period, which payments shall be limited to doctor or other medical expenses, including hospital and nursing bills. The payments are authorized and shall be made

upon the request of said beneficiary and upon the tendering of receipted bills for the aforementioned expenditures.

ARTICLE XIII

In the payment of the legacies, as above provided, I hereby instruct my Executor to pay same first from the income of the investments now held by me. In the event that the income is not sufficient for these bequests, they are hereby instructed to dispose of my assets so as to provide sufficient cash to make the payments in the amounts and at the times specified above. Should there be an excess of cash in my estate over and above the amounts necessary to cover the above bequests, my Executor is authorized to use same for the purchase of, and investment in only the following securities:

Guaranty Trust Company of New York;

Hanover Bank, New York;

New York Trust Company, New York;

Continental Illinois National Bank & Trust Company, Chicago;

—or deposit same in savings banks in amounts not to exceed TEN THOUSAND ($10,000.00) DOLLARS in any savings bank in the cities of Miami, New York, Chicago, Boston, Philadelphia, where the principal sum of deposit is guaranteed by the United States Government. The interest rates received by the estate shall be a secondary consideration. The bank stocks in my estate shall be held and disposed of last, if necessary. The bonds therein shall be the first disposed of. Other stocks shall be disposed of as may be in the judgment of my Executor.

ARTICLE XIV

Upon the demise of the beneficiaries of the trust estate, as set forth in Article VIII hereof, all assets then remaining in my estate shall be liquidated and the monies divided equally and distributed to my nieces and nephews, being the natural or legally adopted children of my brothers,

HERBERT and BERTRAM; and my sisters, HANNAH, LOTTIE and MILDRED; and PATRICIA ANN JULIE, provided that each of these proposed legatees shall have filed in writing with my Executor and Trustee on or before PATRICIA ANN JULIE shall have attained the age of twenty-one years, their desire to be deemed a legatee under [fol. 522] this Will. In the event any of said heirs are minors, such intention may be filed by either their parents or guardian. My executor is given the widest power and latitude, without the assumption of any liability, to comply with my wishes in the execution of this article. No possible heir under this article shall have any vested interest except and unless he or she shall be living at the time of the distribution, as provided for herein, and also provided that there be funds in existence to make such distribution since it may well be that my entire estate may be exhausted in the fulfillment of the prior specific bequests, life estates and annuities provided in this Will. In the event PATRICIA ANN JULIE shall have attained the age of twenty-one years prior to my demise, or shall not survive me, or for any other reason whatsoever her attainment of the age of twenty-one years in the judgment of my Executor cannot be used as a method of computing time within which the election shall be made, then and in that event the election shall be made by the persons specified in this Article within one year from the date of the probate of this Will.

IN WITNESS WHEREOF, I, the said SOL SIMONS, have set my hand and seal to this my Last Will and Testament, contained in seven sheets of typewritten paper, upon this 7th day of May, 1952.

SOL SIMONS

The foregoing instrument, having been read by the Testator in our presence and hearing, was signed, sealed, declared and published by the said SOL SIMONS as his Last Will and Testament in the presence of us, the undersigned, who at his special instance and request did attest as witnesses after he had signed his name thereto, in his

presence and in the presence of each other, this 7th day of May, 1952.

Name	Residence
ROZELLE WHITEHEAD	2515 S.W. 7th St., Miami, Fla.
Frances M. Proctor	3757 Chase Avenue, Miami Beach, Fla.
Gladys Marks	952 E. 28th St., Hialeah, Fla.

[fol. 523] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 524] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

IN CHANCERY

No. 62C 1980 (Kehoe)

LUCY C. SIMONS, a widow, Plaintiff,

vs.

MIAMI BEACH FIRST NATIONAL BANK, a banking institution organized and existing under the laws of the United States, with its principal place of business in the City of Miami Beach, Dade County, Florida, as Executor of the Estate of SOL SIMONS, Deceased, Defendant.

FINAL DECREE—January 30, 1963

Pursuant to proper notice, this cause came on for final hearing, and after careful consideration of the pleadings and the proof, the Court having heard the testimony and received the evidence adduced by the parties at the final hearing, and in all respects being fully advised in the prem-

ises, the Court adopts as its findings the observations made by the Court at the conclusion of the final hearing.

It Is, Ordered, Adjudged, and Decreed, as follows:

1. That the Court has jurisdiction of the parties and the subject matter of this cause and that the equities are with the defendant.

2. That this cause be and it is hereby dismissed with prejudice and plaintiff shall take nothing by her complaint and defendant shall go hence without day.

3. That the costs of this matter shall be taxed against plaintiff. The Court reserves jurisdiction to tax costs upon an appropriate application therefor made by defendant and after notice and a hearing thereon.

[fol. 525] Done and Ordered, at the Dade County Courthouse, Miami, Dade County, Florida, on this 30th day of January, 1963.

John J. Kehoe, Circuit Judge.

[fol. 526] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

IN CHANCERY

No. 62C 1980 (Kehoe)

[Title omitted]

NOTICE OF APPEAL—Filed March 26, 1963

The Plaintiff Lucy C. Simons, a widow, takes and enters her appeal to the District Court of Appeals of the State of Florida, for the Third District, to review the Final Decree of the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, bearing date the 30th day of January, 1963, entered in the above-styled cause, and recorded in Chancery Order Book 1654 Page 269 on Janu-

ary 31, 1963; and all parties to said cause are called upon to take notice of the entry of this appeal.

Dated Miami, Dade County, Florida, this 26th day of March, 1963.

Ward & Ward, 1240 duPont Bldg., Miami, Florida;

Montague Rosenberg, 407 Lincoln Road, Miami Beach, Florida;

Charles Gertler, 420 Lincoln Road, Miami Beach, Florida. By George O. Klutz, of Counsel;

Attorneys for Plaintiff, Lucy C. Simons.

Certificate of Service (omitted in printing).

[fol. 527] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

IN CHANCERY

No. 62C 1980 (Kehoe)

[Title omitted]

ASSIGNMENTS OF ERROR—Filed April 5, 1963

Comes Now the plaintiff, Lucy C. Simons, by and through her attorneys of record, and files this, her Assignments of Error, on the following grounds:

The notice of appeal was filed in this case on the 26th day of March, 1963, appealing from the final decree of this Court dated January 30, 1963 and recorded in Chancery Order Book 1654 at Page 269 on January 31, 1963.

1. The Court erred in entering the final decree, as aforesaid, dated January 30, 1963, and dismissing the suit, thereby denying plaintiff's claim as a widow to dower in the Estate of Sol Simons, deceased.

2. The Court erred in dismissal of the case, in refusing to hold that Lucy C. Simons, the plaintiff, was at the time

of the death of her husband, Sol Simons, in New York City, the wife of said Sol Simons.

3. The Court, in dismissing the suit and denying the claim that Lucy Simons, the plaintiff, was the wife of Sol Simons at the time of his death, failed and refused in so doing to give full faith and credit under the constitutional [fol. 528] provisions of the United States to the fact that the status of the plaintiff and her husband was determined by the proceedings in the State of New York by way of permanent separation for alimony without divorce, and at the time and up to the time of the death of the said Sol Simons he lived and maintained a place of residence in the State of New York, his business was in the State of New York, he died in the State of New York, and he was thereby a resident of the State of New York at the time of his death to the extent that he was bound by his separate maintenance proceedings which created the relationship of husband and wife under the laws of the State of New York at the time of his death.

4. The Court in denying the plaintiff relief and dismissing her cause, erred in refusing to hold that the alleged divorce proceedings in this Court of 1952 were utterly void on their face for matters which clearly appear in the record.

5. The Court erred in holding that the mere knowledge of the pendency of the divorce suit in Florida in 1952 and the receipt of a summons by mail, precluded plaintiff from ever questioning the jurisdiction in this State of Sol Simons as a citizen and resident of this State for divorce purposes, and holding that plaintiff was estopped, or that the suit was res judicata.

6. The Court, in denying plaintiff relief and denying her the status of the widow and her claim to dower in the State of Florida after the death of Sol Simons, has overlooked and failed to consider that where husband and wife have been residents of the State of New York and are separated by a court decree in which both have personally appeared, and the terms and conditions of their relationship, as well as support and alimony, are controlled by that

court, continuing the relationship of husband and wife, that neither of the parties can go into another state, and by simple ex parte proceeding procure a divorce by substituted service other than by personal appearance, and eliminate or determine the dower or wife's interest in his estate upon his death, without setting aside the proceedings in New York State or modifying the same.

[fol. 529] 7. The Court, in holding that the plaintiff had not sustained her burden of proof, misconceived and misconstrued the force and effect of the evidence, and erred in holding that the plaintiff had not shown by competent evidence that the said Sol Simons was not a bona fide resident of Florida in 1952 when he instituted the suit for divorce, and that therefore the Florida Court had no jurisdiction over him or the plaintiff to determine a divorce binding upon the parties.

Ward & Ward, 1240 duPont Bldg., Miami, Florida;

Montague Rosenberg, 407 Lincoln Road, Miami Beach, Florida;

Charles Gertler, 420 Lincoln Road, Miami Beach, Florida. By W. G. Ward, of Counsel;

Attorneys for Plaintiff, Lucy C. Simons.

Certificate of Service (omitted in printing).

[fol. 530]

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

July Term, A.D. 1963

Case No. 63-201

LUCY C. SIMONS, Appellant,

vs.

MIAMI BEACH FIRST NATIONAL BANK, as Executor of the Estate of SOL SIMONS, Deceased, Appellee.

OPINION—Filed October 29, 1963

An Appeal from the Circuit Court for Dade County, John J. Kehoe, Judge.

Ward & Ward; Montague Rosenberg; Charles Gertler, for appellant.

Sibley, Grusmark, Giblin, King & Levenson, for appellee.

Before Carroll, Pearson and Hendry, JJ.

Carroll, Judge.

Lucy C. Simons sued the executor of her deceased ex-husband, seeking to set aside his Florida divorce decree. From an adverse final decree she has appealed.

The wife had obtained a decree for separate maintenance with a support allowance in 1946 in New York. The husband sued for divorce in 1952 in Dade County, Florida. The wife, then a resident of New York, was served by publication, and received copies of the order for publication and the complaint. On advice of her attorney, she did not appear in the Florida divorce suit.

The husband was granted a final decree of divorce in his Florida suit on May 1, 1952. He continued to pay support [fol. 531] money as previously ordered by the New York court until he died in 1960. His will was filed and probated in Florida. The wife sought dower in the probate court.

When her application for dower met objection on the ground that she was not his widow, having been divorced, she filed this suit in the circuit court. In her complaint it was contended the Florida divorce decree obtained by the husband should be set aside for several reasons: (1) that the husband lacked the necessary Florida residence and had defrauded the court by falsely claiming residence, (2) that the New York separate maintenance decree was a bar to the divorce suit and that it was a fraud on the court for the husband to fail to disclose the earlier proceeding, (3) that the decree on its face showed want of jurisdiction, and (4) that after she received notice of the divorce suit the husband lulled her into inaction. The executor answered, and the cause was tried before the chancellor who found for the defendant and dismissed the suit with prejudice. The appellant argues the chancellor's adverse decision on those several contentions was error. On considering the arguments in the light of the briefs and record we conclude no reversible error has been shown.

By choosing not to appear in the Florida divorce suit the non-resident wife was precluded from filing suit years later to set aside the decree for matters which could have been litigated by her in defense of the divorce suit. She had due notice and opportunity to contest the husband's allegations as to his jurisdictional residence and his asserted ground of divorce. If she had defenses to those matters it was her duty to assert them in the divorce suit, and the chancellor was eminently correct in holding she was not entitled to maintain the present suit to set aside the decree for those reasons. Mabson v. Mabson, 104 Fla. 162, 140 So. 801; Bernstein v. Bernstein, 160 Fla. 654, 36 So.2d 190; MacFadden v. Muckerman, Fla.App.1959, 116 So.2d 448. [fol. 532] The prior New York separate maintenance decree was not a bar to a divorce suit by the husband, and his failure to disclose it in his complaint was not a fraud on the court. Matsis v. Matsis, 155 Fla. 786, 21 So.2d 545; Bernstein v. Bernstein, supra. Any affirmative defense the prior suit may have afforded should have been presented in the divorce suit. See Prall v. Prall, 58 Fla. 496, 50 So. 867, 26 L.R.A., N.S. 577; Bernstein v. Bernstein, supra; Gordon v. Gordon, Fla.1952, 59 So.2d 40; Stone v. Stone,

Fla.App.1959, 111 So.2d 486; Taylor v. Taylor, Fla.App. 1961, 130 So.2d 115.

The basis for the contention that the decree showed want of jurisdiction on its face was because it incorrectly recited the defendant had answered. But the record indicates the chancellor was under no misapprehension as to nature and status of the case before him on final hearing. This is so because the master's report, which the court confirmed, showed the true situation in detail.

The appellant's claim that the husband, in 1952 after she had notice of his divorce suit, lulled her into inaction, was properly denied by the chancellor, for her delay (Barnes v. Willis, 65 Fla. 363, 61 So. 828) and on the merits. That issue was tried before the chancellor in the instant case, in the course of which it was required that he judge the credibility of witnesses and resolve conflicts in the evidence, and his ruling thereon is adequately supported by the record.

For the reasons stated the decree appealed from is affirmed.

Affirmed.

[fol. 533] [File endorsement omitted]

IN DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

MANDATE FROM DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT—November 22, 1963

To the Honorable, the Judges of the Circuit Court for the Eleventh Judicial Circuit of Florida. Greeting:

Whereas, Lately in the Circuit Court of the Eleventh Judicial Circuit in and for the County of Dade in a cause wherein

LUCY C. SIMONS, a widow, plaintiff,

—and—

MIAMI BEACH FIRST NATIONAL BANK, a banking institution organized and existing under the laws of the United States, with its principal place of business in the City of Miami Beach, Dade County, Florida, as Executor of the Estate of SOL SIMONS, deceased, defendant,

(Chancery No. 62C 1980)

the decree of said Circuit Court was rendered 1/31/63 as by the inspection of the transcript of the record of the said Circuit Court which was brought into the District Court of Appeal, Third District of the State of Florida, by virtue of an appeal agreeably to the laws of said State in such case made and provided, fully and at large appears:

And Whereas, at the July Term of said District Court of Appeal holden at Miami, A. D. 1963, the said cause came on to be heard before the said District Court of Appeal on the said record on appeal and was argued by counsel; in consideration whereof, on the 29th day of October, A. D. 1963, the said District Court of Appeal rendered its opinion and judgment in said cause as per copy thereof hereto attached and made a part hereof.

In Consideration Whereof, It is Ordered by the Court that the appellee do have and recover of and from the appellant costs in this behalf expended herein and that all other costs shall be taxed in the court in which the appeal was entered, therefore,

You Are Hereby Commanded, That such further proceedings be had in said cause as according to right, justice, the judgment of said District Court of Appeal and the laws of the State of Florida, ought to be had, the said decree of the Circuit Court notwithstanding.

Witness, The Honorable Thomas H. Barkdull, Jr., Chief Judge of said District Court of Appeal, and the seal of said Court at Miami, this 22nd day of November, 1963.

William P. Carter, Clerk District Court of Appeal of Florida, Third District, By Louis J. Spallone, Chief Deputy Clerk.

[Seal]

[fol. 534] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 535] [File endorsement omitted]

IN THE SUPREME COURT OF FLORIDA

LUCY C. SIMONS, a widow, Petitioner,

vs.

MIAMI BEACH FIRST NATIONAL BANK, a banking institution organized and existing under the laws of the United States, with its principal place of business in the City of Miami Beach, Dade County, Florida, as Executor of the Estate of SOL SIMONS, deceased, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT—Filed January 21, 1964

To the Supreme Court of the State of Florida:

Petitioner, Lucy C. Simons, presents this, her petition for a writ of certiorari, and states:

1. Petitioner seeks to have reviewed a decision and mandate of the District Court of Appeal of Florida, Third District, opinion filed October 29, 1963, order denying petition for rehearing filed November 22, 1963.

2. This petition is presented under and pursuant to Article 5, Section 4 of the Florida Constitution, and Rule 4.5c of the Florida Appellate Rules.

3. This petition is accompanied by a partial certified transcript of the record of the proceedings, including the decision petitioner seeks to have reviewed, and a supporting brief.

[fol. 536] 4. The following are the pertinent or controlling facts:

(a) On February 23, 1962 petitioner filed a suit in the Circuit Court for the 11th Judicial Circuit, in and for Dade County, Florida—chancery number 62C 1980. The

case was assigned to the Honorable John J. Kehoe. The complaint is shown R. 1-24.

(b) The complaint showed that Sol Simons had married the petitioner, Lucy C. Simons, sometime prior to 1946; that in 1946 Lucy C. Simons had filed a suit in the Supreme Court of the State of New York against Sol Simons, seeking a decree of permanent separate maintenance on the ground of cruelty. This resulted in a final decree of separate maintenance on said grounds in favor of the plaintiff wife, the petitioner herein, Lucy C. Simons (R. 8). The actual decision of the New York Court was attached as an exhibit to the complaint (R. 19).

(c) It is alleged in the complaint that the parties had been living in New York since their marriage in 1941; that at the time of the separation the parties lived in New York; that both parties were present in the New York Court in a hotly contested separate maintenance action; that the wife was successful; that she was awarded approximately $500 per month, which alimony was paid; that Sol Simons continued to live in the home or apartment where the parties had resided for many years as their matrimonial domicile; that from 1946 to the date of his death in New York City in 1960, he continued to live at the same place in New York City; that he continued to keep up his alimony or support [fol. 537] payments under the New York decree, and that when he died, he was a resident of New York.

(d) It is further alleged that Lucy C. Simons under the law of New York was his widow and entitled to dower.

(e) The complaint shows that Sol Simons had come to Florida and had obtained a divorce by ex parte divorce proceedings in the Circuit Court of Dade County, Florida, final decree being entered May 1, 1952 (R. 17). The decree on its face recited that the case was heard upon the bill of complaint, the defendant's answer and the report of the Special Master.

(f) It is charged in the complaint, all as analyzed in the opinion of the District Court of Appeal of Florida, Third District—(1) that the husband lacked the necessary Florida residence and had defrauded the court by

falsely claiming residence; (2) that the New York separate maintenance decree was a bar to the divorce suit and it was a fraud on the court for the husband to fail to disclose the earlier proceeding; (3) that the decree on its face showed want of jurisdiction; (4) that after she received notice of the divorce suit, the husband lulled her into inaction.

(g) A motion to dismiss the complaint was filed, and was overruled (R. 27).

(h) The answer of the Miami Beach First National Bank, as Executor, was filed (R. 28), and the issue raised was based solely upon the ground that the divorce suit in [fol. 538] Florida based upon the ex parte decree in 1952, completely severed or discharged any right or claim of dower which Lucy C. Simons had in the Estate of her husband at the time of his death in 1960.

(i) As pointed out in the opinion of the District Court of Appeal of Florida, Third District, there were four grounds for attack, but the lower court, after overruling the motion to dismiss the complaint, and hearing substantial testimony and considering numerous exhibits, did not purport to pass upon the weight of the testimony except insofar as it applied to the fourth point, that is to say, that the wife had been lulled into inaction after she had received notice of the filing of the Florida action.

(j) It has been admitted throughout the proceedings that Mrs. Simons did receive a copy of the notice of the filing of the suit in Florida under the usual form of service by publication and by mail. She did contend that after she received that notice she had a discussion with her husband in New York City, and that he had advised her that the Florida proceeding would be dismissed. It was shown that during the time the proceeding was pending in Florida, the husband was personally present and was a part of an amendatory proceeding in the Courts of New York wherein the wife was asking for additional alimony.

(k) On this phase of the case, and that phase only, the lower court, Honorable John J. Kehoe presiding, entered

his order on the 30th day of January, 1963 (R. 34), based solely upon the fact that Lucy C. Simons had not sustained [fol. 539] the burden of proof of showing that she had been lulled into inaction after she had notice of the divorce suit. Page 845 original record, see excerpt supplemental record.

(l) The lower court did not pass upon the contentions (1) that the husband lacked the necessary Florida residence and had defrauded the court by falsely claiming residence; (2) that the New York separate maintenance decree was a bar to this suit in Florida and was a fraud upon the court in Florida; (3) that the decree on its face showed want of jurisdiction. These points have never been passed upon by the lower court.

5. (a) All of the essential factual matters that are necessary for this Court to determine, whether there is a conflict in this opinion with previous opinions of this Court, are contained in the opinion of the District Court of Appeal itself. The Court points out (157 So. 2d 200) that the wife had obtained a decree for separate maintenance with a support allowance in 1946 in New York. The opinion points out that the husband sued for divorce in 1952 in Dade County, Florida, and that the wife was served by publication and received copies of the order for publication and of the complaint, and on the advice of her attorney in New York, she did not appear in the Florida divorce case.

(b) The opinion then points out that the divorce in Florida was granted on May 1, 1952, and that the husband continued to pay the support money as previously ordered by the New York Court until he died in 1960. They point out that the will was filed and probated in Florida, and the [fol. 540] wife sought dower in the Probate Court of Dade County, Florida.

(c) What is not pointed out in the opinion is that he died while a resident of the City of New York in the State of New York; that under the law of the State of New York she was his widow and entitled to widow's rights, whether it be dower or otherwise. The opinion did not disclose that the testimony showed that the alleged residence of the husband in Florida in 1952 was a mere sham and subterfuge;

that the wife had met the burden of proof in the New York case in 1946 with reference to her allegations on the grounds of cruelty; that the actual findings of the lower court, Honorable John J. Kehoe, had been strictly restricted to the question as to whether the husband had lulled her into inaction.

(d) The Chancellor had before him the question as to whether under the decisions of the Florida Appellate Court, Third District, 1959, of *MacFadden* v. *Muckerman*, 116 So. 2d 448, a wife was barred from attacking a Florida divorce decree based upon service by publication, if it could be established that she ever received service or otherwise had knowledge of the pendency of the case.

(e) The controlling issue in this case which must first be determined, and which we say is in conflict, is that part of the opinion of the District Court of Appeal of Florida, Third District, now under attack (157 So. 2d 199, 200), wherein that Court said:

[fol. 541]

"By choosing not to appear in the Florida divorce suit the non-resident wife was precluded from filing suit years later to set aside the decree for matters which could have been litigated by her in defense of the divorce suit. She had due notice and opportunity to contest the husband's allegations as to his jurisdictional residence and his asserted ground of divorce. If she had defenses to those matters it was her duty to assert them in the divorce suit, and the chancellor was eminently correct in holding she was not entitled to maintain the present suit to set aside the decree for those reasons."

quoting certain Florida decisions, including the decision by the District Court of Appeal, Third District, of *MacFadden* v. *Muckerman*, mentioned above.

The Court then found:

"The prior New York separate maintenance decree was not a bar to a divorce suit by the husband, and his failure to disclose it in his complaint was not a fraud on

the court. * * * Any affirmative defense the prior suit may have afforded should have been presented in the divorce suit."

Then the Court said:

"The basis for the contention that the decree showed want of jurisdiction on its face was because it incorrectly recited the defendant had answered. But the record indicates the chancellor was under no misapprehension as to nature and status of the case before him on final hearing. This is so because the master's report, which the court confirmed, showed the true situation in detail."

(f) We point out to the Court that the only point the lower court had passed on was that the plaintiff could not come into equity if she had knowledge of the first divorce suit while she was a resident in New York. The two points which are mentioned by the Appellate Court were not [fol. 542] passed upon by the lower court at all.

(g) The controlling issue is the final holding by this decision of the Third District that no matter how bad or how defective the proceeding in Florida brought by the husband was, no matter if it clearly disclosed that the husband did not have any jurisdiction or any residence in Florida to give jurisdiction, that no matter how fraudulent the proceedings were, the wife had to answer the summons by substituted service, and raise all of those questions or she was forever barred.

(h) We think this Court will immediately see that there has been given a judicial and legal effect to a service by publication or by mail service, far greater than is even afforded to personal service upon an alleged defendant under the Florida law.

(i) To this extent, and as we have charged and explained in the briefs, this decision violates and is in direct conflict with the several opinions by the Supreme Court of Florida, beginning with the case of *Chisholm* v. *Chisholm*, 125 So. 847; *Kelly* v. *Kelly*, Supreme Court of Florida, 75 So. 2d

191. Although these cases and many others in Florida were clearly presented to the Court, the opinion of the District Court of Appeal does not reflect any attempt by the Court to distinguish those cases. The opinion under attack simply holds unequivocally that any knowledge Mrs. Simons had of the pendency of the Florida case required her to come into Florida and defend that case, or be forever barred.

[fol. 543] (j). In these cases, which we will discuss in the supporting brief, this Court has definitely held that where there is a jurisdictional infirmity because of the plaintiff's lack of residence in Florida, that that fact is fatal to the decree, and that the decree is void, not merely voidable, and is not binding upon the other party who has simply been served with process but has never appeared.

(k) In the case of *Kelly* v. *Kelly*, 75 So. 2d 191, which we will further discuss in our brief, this Court held that where the wife waited practically two years to file a suit to set aside a divorce decree in favor of her husband in Florida, there was no laches, in the absence of a showing of legal injury, embarrassment or disadvantage to the husband.

(l) We have not attached to the certified copy of the record at this stage of the proceeding the rather lengthy transcript of the actual testimony, and the exhibits, in the Circuit Court action, or the record and exhibits which were forwarded to the Appellate Court. We respectfully request that under the provisions of Rule 4.5 Appellate Procedure, last paragraphs of subdivision c, that if this Court determines to entertain the petition for certiorari, that it will then enter such additional order as it may deem fit and proper with reference to further briefs or further records.

(m) As an additional or collateral factor, the District Court of Appeal in its opinion did not purport to even pass [fol. 544] upon another controlling feature of the law. The main purpose of the proceeding in the Circuit Court was to establish the widow's right to dower in the estate of Sol Simons. When Sol Simons died in New York City while a resident, as we contend, of the State of New York, Lucy C. Simons was his legal widow. She had been declared to

be entitled to a separate maintenance decree on the same grounds which would have constituted her right for divorce in Florida, had the parties been residents in Florida, that is to say, extreme cruelty. The parties had not lived together since 1946, and there could not have been any grounds of matrimonial cruelty as between the parties since 1946 because they had not purported to live together as husband and wife. Mrs. Simons had a property right as the widow of Sol Simons. This was a right guaranteed to her under the Constitution of the United States, which requires that full faith and credit be given to the decrees of the courts of a sister state. These fundamental rights are an essential part of a constitutional guaranty, and raise not only a problem for this Court to pass upon, but raise a federal question. The decree of the New York Court is res judicata and is binding on any court of the land.

(n) For a recent exposition of the law on this question, we refer this Court to the recent opinion of Durfee vs. Duke, December 15, 1963 Advance Sheet, Supreme Court Reporter, 84 Supreme Court 242, decided December 2, 1963.

[fol. 545] (o) In the Durfee vs. Duke case, the Supreme Court of the United States was involved with a question of full faith and credit, and validity of a judgment by the Supreme Court of Nebraska, upholding the title of Nebraska citizens to a strip of land formerly in the State of Missouri, and south of the channel of the Missouri river, the dividing line, as against the claim of the former owners of the property, who lived in Missouri, and who owned the land formerly in Missouri. The Federal Courts of Missouri, including the U. S. Court of Appeals for the Eighth Circuit, held that the Nebraska Court had no jurisdiction. The Supreme Court of the United States granted certiorari, and held that even if it did not have actual jurisdiction over the res the fact that the Missouri parties went into the Nebraska Court, made that decree res adjudicata as between the parties but not in settling the boundary line between the States. The Court referred to Sherrer vs. Sherrer, 334 U.S. 343, 68 Supreme Court 1087, 92 L.Ed. 1429. It held that although the divorce doctrine had not been applied to land titles, and this was a case of first impression, the ap-

pearance of the parties in Nebraska Court where the issues were determined, was final, and all other Courts thereafter had to recognize it. In the Sherrer case, which involved a Florida divorce, where the Probate Court of Massachusetts refused to recognize it, the Supreme Court of the United States held in effect that the personal appearance of both spouses in Florida and contested in Florida, could not be relitigated, and distinguished the case of Williams vs. North Carolina, 325 U.S. 226, 65 Supreme Court 1092, 89 L.Ed. 1577, 157 A.L.R. pointing out that the doctrine of the [fol. 546] Williams case was still law because in the Williams case one of the spouses did not appear in the State Courts of Nevada. See page 1090 of 68 Supreme Court Reporter. On page 1091 in the same Sherrer case, the Supreme Court distinguished the Sherrer case with the previous opinion of the Supreme Court of Andrews vs. Andrews, 188 U.S. 14, 23 Supreme Ct. 237, 47 L.Ed. 366. In that case the husband, who had been domiciled in Massachusetts, instituted a divorce action in South Dakota. The wife first appeared by counsel in the South Dakota Court, and then pursuant to a consent agreement between the parties, withdrew her appearance. Nevertheless the South Dakota Court entered a divorce decree. After the divorce the husband returned to Massachusetts (just like the case at bar where Mr. Simons immediately returned, if he had ever left New York). Mr. Andrews remarried, and then died while he was in Massachusetts. The Massachusetts Court in the Probate proceeding held that the South Dakota decree of divorce was void as to the property rights, and held that the first wife was entitled to the estate, as against the claim of the second wife. This was appealed to the Supreme Court of the United States and affirmed. The effect of the Durfee decision if applied to the Simons case, would result in the conclusion that the decree in the contested separate maintenance case in New York in 1946, where Mrs. Simons was granted a permanent separation with alimony for life, and upon Simons death establishing her status as his widow, is res adjudicata, and a Florida divorce thereafter granted on the same issues without the personal appearance of the wife in Florida, would be a nullity on the property rights of the wife.

[fol. 547] See also Armstrong vs. Armstrong, 350 U.S. 568, 76 Supreme Court 629, 99 L.Ed. 1248, 123 N.E. 2nd 267. This case arose from an ex parte divorce decree in the Circuit Court of Dade County, Florida, where the Ohio Supreme Court applying the doctrine in the case of Pawley vs. Pawley, 46 So.2d 464, held that the ex parte divorce decree in Florida had no effect upon the wife's property rights or claim in interest in property held by the husband.

[fol. 548] (p) The questions pertaining to the property rights of this widow were fully presented to the lower court and to the District Court of Appeal of Florida, Third District. The lower court, as well as the District Court of Appeal, completely ignored this property right issue and treated this case as if Mrs. Simons were still living. The issue as to whether the divorce was effective to support a claim that the parties were, in fact, divorced a vinculo matrimonii by virtue of the Florida decree, is of no importance. It is only the effect or claimed effect of that decree based upon substituted service which is important.

(q) The question, therefore, is very clear, that a husband living in New York City, whose property and person are in New York at the time of his death, can circumvent the rights of his wife by simply declaring himself in a prior will to be a resident of Florida, and appointing a Florida bank as the executor of his estate.

(r) If such a proceeding can be used to circumvent the rights of the widow, then truly all full faith and credit of foreign decrees has been ignored by the appellate decision.

(s) The primary conflict which is simply raised from the face of the opinion, clearly shows that this opinion, if permitted to stand, is not only directly in conflict with the Florida decisions above mentioned, but purports to give the right to a husband to completely violate the laws of the state in which the parties had their matrimonial domicile, and to defeat the rights of the wife. We have here a [fol. 549] case where Lucy C. Simons in the State of New York is the legal widow of Sol Simons, deceased. Can she be defrauded of her rights as his widow by the process used herein? According to the opinion under attack she

can be, simply by service by publication, without any finding or determination by the Florida Court that Sol Simons was actually a bona fide resident of Florida so as to give the Florida Court jurisdiction. If this case were permitted to stand, it would be a shocking situation, and one not at all consistent with the actual and specific cases and decisions of the Supreme Court of Florida, but it is dead contrary to the concepts of the federal doctrines which have been in force and effect since the famous decision of *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L. Ed. 565; *Rice* v. *Rice*, 336 U.S. 674, 69 Sup. Ct. 751, 93 L. Ed. 957; *Armstrong* v. *Armstrong*, 350 U.S. 568, 76 Sup. Ct. 629, 349 U.S. 915; *Williams* v. *State of North Carolina*, 317 U.S. 287, 63 Sup. Ct. 207, 87 L. Ed. 279.

(t) These matters have not been covered by the opinion of the District Court of Appeal, Third District, but are pertinent and controlling. However, there is no question but that Lucy C. Simons did know about the Florida proceeding, and that she did not come into the State of Florida to oppose that proceeding. If this Court sees fit to uphold that doctrine, although in conflict with this Court's decisions in other cases, then further briefing or further records in this case before this Court would not be of any assistance. [fol. 550] If, on the other hand, this Court will not adhere to that broad doctrine, then we respectfully petition the Court to permit oral argument, and to permit us to present detailed briefs with reference to the other phases of the case just as they were presented before the lower court and before the District Court of Appeal of Florida, Third District.

Respectfully submitted,

Ward & Ward, 1240 duPont Bldg., Miami, Florida;

Montague Rosenberg, 407 Lincoln Road, Miami Beach, Fla.;

Charles Gertler, 420 Lincoln Road, Miami Beach, Fla., By W. G. Ward, of Counsel.

Attorneys for Petitioner, Lucy C. Simons.

Certificate of Service (omitted in printing).

[fol. 551] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 552]

IN THE SUPREME COURT OF FLORIDA

January Term, A. D. 1964

Case No. 33,206

LUCY C. SIMONS, a widow, Petitioner,

vs.

MIAMI BEACH FIRST NATIONAL BANK, etc., Respondent.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI—May 13, 1964

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal, Third District of Florida, in said cause bearing date October 29, 1963, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A True Copy.

Test:

Guyte P. McCord, Clerk Supreme Court.

[fol. 553]

STATE OF FLORIDA
COUNTY OF DADE

I, William P. Carter, Clerk of the District Court of Appeal of Florida, Third District, Do Hereby Certify that the above and foregoing order is a true and correct copy of a true copy of the order of the Supreme Court of Florida denying a petition for writ of certiorari to this court as certified to me by Guyte P. McCord, Clerk of the Supreme Court of Florida, in the case of Lucy C. Simons, a widow,

Appellant, vs. Miami Beach First National Bank, as Executor of the Estate of Sol Simons, Deceased, Appellee, Case No. 63-201.

In Witness Whereof I have hereunto set my hand and affixed the Seal of said Court this 22nd day of July, A.D. 1964.

William P. Carter, Clerk District Court of Appeal of Florida, Third District.

[fol. 554]

SUPREME COURT OF THE UNITED STATES

No. 363—October Term, 1964

LUCY C. SIMONS, Petitioner,

vs.

MIAMI BEACH FIRST NATIONAL BANK, etc.

ORDER ALLOWING CERTIORARI—October 19, 1964

The petition herein for a writ of certiorari to the District Court of Appeal of the State of Florida, Third District, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 337]

EXHIBIT 3 TO COMPLAINT

SUPREME COURT, NEW YORK COUNTY,
Special Term, Part IV.

LUCY C. SIMONS,
Plaintiff,

—against—

SOL SIMONS,
Defendant.

Before:

Mr. Justice James B. M. McNally

New York, Monday, November 25, 1946

Appearances:

WEISMAN, CELLER, QUINN, ALLAN & SPETT, Esqs.,
(1450 Broadway, New York City),
Attorneys for Plaintiff,

By: ABRAHAM MOPPER, Esq., of Counsel.

MILLARD & GREENE, Esqs.,
(270 Broadway, New York City),
Attorneys for Defendant,

By: MYRON J. GREENE, Esq., and
NATHANIEL KATZ, Esq., of Counsel.

Nathan Behrin,
Official Stenographer

[fol. 338]

DECISION OF THE COURT

J. MCNALLY:

The plaintiff, Lucy C. Simons sues the defendant Sol Simons for a separation charging cruel and inhuman treatment. The parties were married September 5, 1941, in New York City, and they have no children.

Prior to her marriage Mrs. Simons had never been married before, and she had been gainfully employed during the entire course of her adult life as a typist and stenographer and secretary. Prior to her marriage she had been working for one firm for approximately nine years, making $48.00 a week, according to her testimony. She is a graduate of one of our public high schools, and, in addition, took a course in Woods Commercial School.

Subsequent to her marriage on September 5, 1941, she remained employed until some time in February 1942.

At the time of the marriage Mr. Simons had been a customers man in a stock brokerage concern, and some time in the year 1941 he had started in business on his own account as a food broker.

Upon the marriage of this couple they took up residence in Forest Hills, in a 3-room apartment, for which they paid $70 a month.

The plaintiff, Mrs. Simons, for the first five months of her married life carried on her usual occupation as a stenographer employed by a New York firm; and in addition thereto, she did the cooking and clerical work that was required to be done in connection with her husband's business.

[fol. 339] Subsequent to February 1942, when she discontinued her employment in New York, she assumed all the clerical work in connection with her husband's business, and the business was run from the 3-room apartment in Forest Hills, for which a monthly rental of $70 was paid. Down to the time the parties separated in February of 1946, the plaintiff, Mrs. Simons, continued to do all the clerical work that was necessary in connection with her husband's business, took stenographic notes of all letters, typed up the letters, and mailed the letters; also kept accounts in her own handwriting of her husband's transactions. The information which she kept in her own handwriting was received from her husband's check book, which he kept in his own handwriting. He kept no books of account whatsoever in connection with his business, his entire business being run through a check book, according to his testimony. So all the facts and figures in connection with his business

originate with him, and any information concerning them, which was copied by his wife was only a copy of figures which he made out himself.

The business prospered, according to the defendant's own testimony, his income for 1942 before taxes was $5,008.61; in 1943, before taxes, $18,850.64; in 1944, $26,707.56; in 1945, $28,093.79. Whether or not this represents the net income, it is difficult to say, in view of the fact that the defendant admits a gross income in the year 1945 in the sum of $42,000. and a gross income in the year 1944 in the amount of $39,038. By way of explanation as to the difference between the gross income in 1945 and the net income in 1945, the defendant testified, in substances, that he traveled from four and a half or five months in the year 1945, and that his travel and entertainment expenses during the time he was on the road were $3935.59. That is approxi- [fol. 340] mately $800 a month, or between $25 and $30 a day.

In connection with his other deductions, he said that his expenses for his automobile during the seven months he was in the city was $933.09; that is, approximately, $130 a month for the seven-month period. Further he testified that he had entertainment expenses and gifts in the sum of $3237. He broke that item down, and he said $1908 were gifts which he made to his customers, and the balance was for entertainment while he was in the city. He also charged $456 for automobile depreciation. He charged an item for rent in the sum of approximately $200, as I recall it. It is difficult to say what is the real net in connection with the business, but I should say the business apparently prospered from the time of its beginning in 1941 down to and through 1946.

The plaintiff claims and has offered testimony in support of her complaint that her husband was autocratic and despotic, egotistical and tyrannical, and that his actions were such as to constitute inhuman treatment, and in support of her complaint she testified that on various occasions he struck her and forced her to leave by reason of his treatment; that he used vile and abusive language toward her, and that he characterized her as a rat, a snake, a louse, a kike, stupid, vulgar and a guttersnipe; that he attempted

to dominate her every act, and that his actions were calculated to and did cause her to become very nervous, and that he struck her on a number of occasions; that he caused a commotion at the scene of her mother's burial in the middle of February 1942, and on another occasion he was very insulting towards a cousin in connection with a family card game; that he referred to the cousin as a "sour puss, and that all the Coopers"—the Coopers being Mrs. Simons' family—"were crazy."

[fol. 341] She also says that her husband's actions in this regard became more noticeable as he began to make money, and that his egotism knew no bounds, and that the more successful he became the more abusive he became and domineering.

The husband, on the other hand, says that he can give no reason for his wife's leaving him except that she was suffering from change of life or menopause, and he said that he did not arrive at this conclusion until after the action was begun. He said thirty or forty days after he was served with the summons and complaint, he thought of the previous explanation given by his wife and he asked her what was the reason for these things, or why she always left him, and she told him that something seemed to possess her, and thinking it over, he thinks that the reason for her actions was by reason of her change of life or menopause.

On the contrary, on rebuttal, Mrs. Simons took the witness stand and testified she never had any manifestations of any condition known as change of life or menopause.

The question is one of fact. Practically every witness in the cause who testified was related to one of the parties, with the exception of Mary Sahanek, a woman who worked as a cleaner for the parties hereto substantially all their married life. Her testimony is to the effect that she heard arguments ten or twelve times, but she did not know the nature or the extent of the arguments. On one occasion she said the arguments became so violent that she left the house of the parties without her hat and coat.

The question really gets down to the question of fact between the plaintiff and the defendant. On the facts I be-

[fol. 342] lieve that the plaintiff was a dutiful and loving wife, and that she did everything in her power to make a

go of this marriage. I believe that the husband's testimony is unworthy of belief. I believe he was tyrannical, despotic; that he is a consummate actor; that he turns on tears as one would turn on Croton water.

I am not impressed with the tremor in his voice or the catch in his voice. I am not impressed with what I say is the false tear in his eye when he gave testimony.

I believe that he was cruel; that he was inhuman; that he beat his wife, who is five feet one inch and weighs 120 pounds; that he is six feet and weighs over 250 pounds; and I believe that every action on his part was calculated to and did bring about a nervous condition in his wife, and that no woman has a right to stand it.

Judgment in favor of the plaintiff on the merits.

Alimony, $500 a month.

Mr. Greene: On behalf of the defendant we respectfully except to the findings made by your Honor, on the questions of fact.

The Court: Submit findings and conclusions in keeping with this decision.

Mr. Greene: We respectfully except to the conclusions of law. May I also at this time respectfully except to the fact that your Honor by his tone of questioning, before the case was even half in, seemed to have arrived at a conclusion prior to hearing all the evidence in the case.

The Court: Take any exception you wish.

Mr. Greene: Yes, your Honor, I want to take it in your Honor's presence, or it is invalid. Your Honor realizes my duties in the case.

I further take violent exception to your Honor's excoriation, which I do not think is warranted by the evidence on a pure question of fact.

[fol. 343] The Court: Take any exception you wish.

Mr. Greene: I except to the fact that your Honor, while this disinterested witness Mary Sahanek was testifying, by your attitude of voice intimidated the witness so that she could not give any answers properly.

I except to your Honor's findings of fact on the financial income, which are uncontradicted, uncontroverted, and on which all figures were submitted as a basis and for justification.

I respectfully except to your Honor's findings as contrary to fact and as not warranted by law. Of course this is all very respectfully done.

The Court: Submit findings and conclusions in keeping with the decision.

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JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 363

LUCY C. SIMONS,
Petitioner,

vs.

MIAMI BEACH FIRST NATIONAL BANK, as Executor of the Estate of SOL SIMONS, Deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. .....

LUCY C. SIMONS,
Petitioner,

vs.

MIAMI BEACH FIRST NATIONAL BANK, as Executor of the Estate of SOL SIMONS, Deceased,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

To the Honorable Earl C. Warren, Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, LUCY C. SIMONS, respectfully prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of Florida, Third District, the opinion having been filed on October 29, 1963, and reported in 157 So.2d 199. A petition for rehearing in the District Court of Appeal of Florida, Third District, was denied November 22, 1963. A timely petition for writ of

certiorari was filed on January 21, 1964, in the Supreme Court of Florida and copy filed with the Clerk of the District Court of Appeal of Florida, Third District (Tr. 62), which stayed all proceedings until denial of that writ by the Supreme Court of Florida on May 13, 1964.

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Third District, dated the 29th day of October, 1963, is now reported in 157 So.2d, at page 199, and a copy thereof is reproduced and attached at Appendix "A", *infra*, page A1.

JURISDICTION

The opinion of the District Court of Appeal of Florida, Third District, was made and entered as aforesaid on the 29th day of October, 1963. Petition for rehearing was filed within the time allowed by the Florida Rules of Appellate Practice, which stayed any issuance of the mandate on the original opinion. The petition for rehearing was denied by the said District Court of Appeal of Florida, Third District, on November 22, 1963, as shown in Appendix "A," page A4. A timely petition for certiorari was filed in the Supreme Court of Florida on the 21st day of January, 1964, which stayed proceedings until the petition for certiorari was denied and the Supreme Court of Florida refused to take jurisdiction. This order, as aforesaid, was entered on May 13, 1964, a copy of which is attached as Appendix E.

The petition is filed timely (Title 28 U.S.C., § 2101). The jurisdiction of the Supreme Court of the United States is invoked under Title 28 U.S.C., § 1257, as a certiorari

from the final judgment or decree rendered by the highest Court of the state in which a decision can be had. The District Court of Appeal of Florida is the highest state Court where the petitioner unsuccessfully petitioned for further discretionary review in the Supreme Court of Florida (*Douglas* v. *People of the State of California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811).

QUESTIONS PRESENTED

Lucy C. Simons and Sol Simons had been married in the State of New York for many years prior to 1946. They lived continuously in New York as their matrimonial domicile. On the 25th day of November, 1946, a permanent decree of separation was entered in favor of the wife, Lucy C. Simons, on grounds of cruelty, and allowance was made for permanent alimony. The husband, Sol Simons, continued to live in an apartment where the parties had lived during their marriage and he, the husband, remained domiciled in that same apartment until he died in New York on October 26, 1960.

In 1952 Sol Simons, the husband, purported to set up an alleged domicile in Dade County, Florida and filed a suit for divorce on the same grounds which he had asserted unsuccessfully in the Supreme Court of New York, wherein that Court found against Sol Simons on his alleged grounds for separate maintenance and ruled in favor of the wife, Lucy C. Simons.

In the Florida suit service by publication was issued. The wife did not enter her appearance in the State of Florida, although admittedly she had knowledge of the filing of the suit in Florida. At the time the Florida suit was filed a petition was still pending in the Supreme

Court of New York wherein the wife sought an increase in alimony. There were contested hearings in which the said Sol Simons personally appeared. During the time the suit was pending in the Supreme Court of New York asking for modification of the alimony, the husband continued to prosecute his suit as plaintiff for a divorce in the State Court of Florida. The Supreme Court of New York rendered its amended opinion and order granting relief to the plaintiff for additional alimony, which order was entered on the 31st day of March, 1952 (see Tr. 206). A final decree of divorce was granted in the State Court in Florida on the 30th day of April, 1952. The husband at no time left his domicile in the State of New York, but purported to set up a residence in the State of Florida, which the petitioner claimed was wholly fictitious.

Sol Simons continued, as contended by the petitioner, without interruption as a citizen and resident of the State of New York, in the same apartment in which he and his wife had lived and where he continuously lived until he died on the 26th day of October, 1960.

Upon the death of Sol Simons in New York a will was filed for probate in the County Judge's Court in and for Dade County, Florida, wherein the Miami Beach First National Bank was executor. The will made no provision for Lucy C. Simons, who in the State of New York was the legal widow of Sol Simons and was entitled as the surviving wife to certain portions of the estate of Sol Simons.

The wife filed a petition in the County Judge's Court in and for Dade County, Florida, claiming to be the wife of Sol Simons as of the date of his death and claiming a dower interest or widow's rights in his estate. The executor filed an objection on the sole ground that the decree

of divorce entered in the ex parte proceedings in Florida in April, 1952, was a complete bar to any claim.

Under the procedure in Florida where objection is made by an executor to a claim of dower or property rights of a wife or where a claim of any kind is contested, the Circuit Court has jurisdiction to determine these matters. On February 23, 1962, Lucy C. Simons filed her complaint in the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County, case No. 62C 1980. This complaint, as shown in the Transcript of the Record beginning on page 1, set forth the status of the domicile. The complaint also set forth that the residence of Sol Simons at the time of his death was New York City, and set forth other detailed allegations as to why the alleged residence claimed by Sol Simons in Florida in 1952 was false and fraudulent. Attached to that complaint as exhibits, on page 12 of the Transcript is shown the petition for dower; a copy of the judgment of the Circuit Court of Dade County, Florida, dated April 30, 1952, is shown on page 15 of the Transcript; a certified copy of the decree for separate maintenance from the Supreme Court of New York County, State of New York, entered on November 25th, 1946, is shown in the Transcript on pages 16 through 22.

The motion to dismiss filed by the executor was denied by the Judge of the Circuit Court (Tr. 27) and the executor was required to answer. The answer of the executor was then filed (Tr. 28) and claimed, among other matters, that Sol Simons was a resident of Dade County, Florida, at the time of his death on October 26, 1960. The answer further set forth that the widow's rights to take anything from the estate of her husband were barred because of the final decree of divorce entered on April 30, 1952.

The Court heard extensive testimony, at which time various exhibits were introduced and numerous witnesses were heard, particularly with reference to the fact that the proceedings in Florida brought by Sol Simons were void on their face and that the Florida Court had no jurisdiction of any matrimonial disputes between Sol Simons, the husband, and Lucy C. Simons, the wife, in that the alleged ninety-day residence claimed by Sol Simons had never severed his residence and citizenship in New York State and at the time of his death he was a resident of New York and the rights between the parties were governed by the decree of separate maintenance as entered in 1946.

The decree of the Circuit Court is shown in the Transcript at page 34, and that Court's opinion was based solely upon one issue. That issue was that under the Florida law the service by publication was absolutely binding upon the wife in New York State if it could be shown that she received that notice of the pendency of the suit in the Florida Court. The Court in effect held that since admittedly Lucy C. Simons knew about the suit and failed to appear in Florida to contest the suit, she was thereafter barred from attacking the validity of that decree unless she could allege and prove that she had been misled or that the deceased husband had made misrepresentations or inducements which prevented her from entering into the contest in Florida. The Court did not make any findings that Sol Simons had a bona fide or legal residence in Florida at the time he instituted the suit in March, 1952. The lower Court made no effort to determine whether that residence was purely a fiction. The lower Court made no effort to determine whether Sol Simons continued to be a resident of the State of New York from April 30, 1952, until the time he died in New York in October, 1960.

A notice of appeal was filed on the 26th day of March, 1963, and assignments of error were filed (see Tr. 37) and among the seven assignments of error, assignment of error No. "3" directly asserted that the Florida State Court was in error in failing to hold that at the time Sol Simons died Lucy C. Simons was his wife under the laws of New York, and that in failing to so hold the Court had failed and refused to give full faith and credit under the United States constitutional provision of the proceedings in the State of New York under which permanent separation for alimony without divorce had been entered in 1946.

The assignments of error further specifically charged that the marital status of the parties had been determined by the New York proceedings, in which both parties had entered personal appearances and which was binding upon the parties up to the time of the death of Sol Simons in October, 1960.

On the appeal to the District Court of Appeal of Florida, Third District, that Court rendered its opinion on October 29, 1963, which is shown in the Transcript of the Record at page 41. The opinion of the Court is attached hereto as Appendix A, p. A1.

In this opinion the Appellate Court in speaking of Mr. Simons found:

> "The husband was granted a final decree of divorce in his Florida suit on May 1, 1952. He continued to pay support money as previously ordered by the New York court until he died in 1960."

The Appellate Court did not consider the legal status and matrimonial domicile or residence of Sol Simons from 1952 to the date of his death in October, 1960, except to confirm the fact that Sol Simons continued to make the

payments of alimony as fixed under the New York decree up until the time of his death. The Court concluded in its opinion as follows (Tr. 42):

> "By choosing not to appear in the Florida divorce suit the non-resident wife was precluded from filing suit years later to set aside the decree for matters which could have been litigated by her in defense of the divorce suit. She had due notice and opportunity to contest the husband's allegations as to his jurisdictional residence and his asserted ground of divorce. If she had defenses to those matters it was her duty to assert them in the divorce suit, and the chancellor was eminently correct in holding she was not entitled to maintain the present suit to set aside the decree for those reasons." (Quoting certain Florida decisions).

On November 13, 1963, Lucy C. Simons, through her counsel, filed a petition for rehearing and/or clarification, which is shown on pages 44 through 61 of the Transcript. A copy of this petition is attached hereto as Appendix B, p. A4.

The petition for rehearing was denied in the District Court of Appeal of Florida, Third District, on November 22, 1963, and a timely petition for a writ of certiorari to the District Court of Appeal of Florida, Third District, was filed in the Supreme Court of Florida on January 21, 1964. Under the Florida appellate practice a true copy of the petition for writ of certiorari must be filed with the District Court of Appeal of Florida, Third District, simultaneouslv with the filing of the original petition in the Supreme Court of Florida. A copy of this petition for writ of certiorari is a part of the certified record, beginning on page 62 of the Transcript, and a copy is attached hereto as Appendix D. p. A26.

That petition for a writ of certiorari, the granting of which is discretionary with the Supreme Court of Florida,

was denied without opinion and without the Supreme Court of Florida taking jurisdiction on the merits. The date of the entry of that order by the Supreme Court is May 13, 1964 and the order was filed with the Clerk of the District Court of Appeal of Florida, Third District, on June 1, 1964. A certified copy of said order is attached to the record and a copy is attached hereto as Appendix E, p. 39.

In the assignments of error filed in the first appeal to the District Court of Appeal of Florida, Third District, in the petition for rehearing filed after the opinion of the District Court of Appeal of Florida, Third District, had been issued, and in the petition for a writ of certiorari filed in the Supreme Court of Florida, the said Lucy C. Simons had asserted and maintained her position at all times that the proceedings in the divorce action in 1952 in the Circuit Court of Dade County, Florida, were void because:

(1) The proceedings in New York and the judgment thereon in 1946 were res judicata as to the marital status of the parties;

(2) That under the decree Lucy C. Simons continued to be the wife of Sol Simons and that on the date of his death in New York City the marital status was still determined by that New York decree;

(3) That as his wife at the time of his death in New York City she was entitled to her widow's rights, which were similar in many respects to a wife's claim for right of dower under the Florida law;

(4) That the wife's rights, controlled and covered as they were by the New York decree, could not be severed by the alleged fictitious residence of Sol Simons in Florida and relied upon to give validity to the Florida proceedings;

(5) That the Florida Courts were bound to give full faith and credit to the New York decree and that the Florida Courts did not have jurisdiction by a mere ex parte divorce action in Florida, based upon substituted service by publication, to deprive the wife of her constitutional and statutory property rights granted to her and protected by the New York proceedings.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Statutes

(1) U.S.C.A., Title 28, § 1738, 62 Stat. 947:

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947."

(2) Constitutional Provisions, United States Constitution, Article IV, Section 1:

"Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

STATEMENT

In the statement of the questions involved and the reference to the record we have set forth in some detail the steps taken in the Courts of Florida and we will merely summarize the factual background.

The petitioner, Lucy C. Simons, and Sol Simons were married in 1941.. The certified records in the Supreme Court of New York which were presented to the Florida Court are shown in the Transcript of the Record beginning on page 16 through page 22. The husband and wife were both personally served and were in the Court personally and through their attorneys. The Court in its decree filed November 25, 1946, fully outlined the background of the marriage relationship since the time of the marriage in 1941 up until the time of the separation and consequent suit for separate maintenance, as reflected in the decree above mentioned. In that opinion the Court pointed out that the basis of the wife's complaint was that the husband was autocratic and tyrannical and his actions were such as to constitute inhuman treatment. As pointed out in the opinion, the husband denied those claims and made the further claim that the wife's actions were the cause for the disagreement between the parties. The Court found (see Tr. 20):

"On the facts I believe that the plaintiff was a dutiful and loving wife, and that she did everything in

her power to make a go of this marriage. I believe that the husband's testimony is unworthy of belief. I believe he was tyrannical, despotic; that he is a consummate actor; that he turns on tears as one would turn on Croton water.

* * *

I believe that he was cruel; that he was inhuman; that he beat his wife, who is five feet one inch and weighs 120 pounds; that he is six feet and weighs over 250 pounds; and I believe that every action on his part was calculated to and did bring about a nervous condition in his wife, and that no woman has a right to stand it."

We point this out because we have squarely raised on behalf of the petitioner the question that not only did the New York Court have the right to determine the factual issues between the parties as of 1946, but that all of the testimony had been presented by both the plaintiff and the defendant and that there had been a factual determination by the New York Court. Thereafter, as charged in the complaint in the State Court of Florida and as shown in the record of the testimony submitted herewith, the husband's procedure in the Florida Court was wholly illegal. The plaintiff, the petitioner herein, charged that the State Court of Florida never had any jurisdiction over the husband, nor did it have jurisdiction over the matrimonial affairs, because his residence in Florida was merely a fiction; that the lower Court in Florida entered a decree based upon a finding that Lucy C. Simons, the wife, had actually filed her appearance and answer in the State Court, which was wholly fictitious and improper; and further it was contended that the exact grounds for divorce and the exact facts for divorce sought to be established in the Florida case were identically the same grounds and the same facts presented to the New York Court in 1946 and upon which a rul-

ing was made adverse to the husband's contentions. Voluminous testimony was taken in the Court below and many of the depositions were read into the record which conclusively established that Sol Simons never left his permanent residence and domicile in New York; that he continued to maintain the same apartment in which the parties had resided prior to 1946; that he maintained that apartment, having a housekeeper at all times; that he was never away from that place of residence in New York for more than several weeks at a time, and that he continued to keep his automobile, or at least one automobile, and conducted his business from that apartment. The testimony will clearly show that even his Florida lawyer advised him that he would have to give up his apartment and permanent abode in New York as a part of his alleged establishment of a residence in Florida, but which he never did. At the best the testimony merely showed that he rented an apartment in Miami, Florida, and he was here for several weeks and immediately departed and went back to New York after May 1, 1960, and never established any residence in Florida, but continued without any break or change until he died in October, 1960, in New York. The lower Court and the appellate Court in Florida did not give any consideration at all and made no effort to pass upon these factual matters.

We have pointed out that in the opinion of the District Court of Appeal of Florida, Third District, the Court used as its sole reason for affirming the lower Court the fact that Lucy C. Simons actually received the service from the Florida Court by mail and that upon the advice of her then New York counsel and relying upon the proceedings in New York she did not enter any appearance or contest in the Florida Court.

When Sol Simons died he left a Will, as pointed out in the opinion, and the Miami Beach First National Bank, Miami Beach, Florida, was named as the executor and proceedings for probate of that Will were filed in the County Judge's Court in Dade County, Florida. As reflected in the record, the assets of the estate of Sol Simons were largely, if not entirely, intangible property, such as stocks and bonds. The effect of this opinion by the Florida court was to deny the legal wife in New York any widow's claims, either by dower or otherwise, in an estate consisting almost wholly of intangible property in an amount in excess of $1,000,000.00. The only factual matter which was referred to in the opinion of the District Court of Appeal of Florida, Third District, was the mere statement that Sol Simons died in 1960. No efforts were made by the lower Court or the appellate Court of Florida to consider whether the divorce decree in Florida was utterly void or whether Sol Simons ever set up a legal residence even under the laws of Florida, and the sole issue turned on the simple fact that if a wife in New York even knows about the fact that a husband had gone to another state, such as Florida, seeking a divorce and she fails to enter that case, she, her heirs, or anyone claiming by, through or under her, is forever barred from ever attacking by a direct attack the bona fides of the residence and is forever barred from claiming her rights under the New York decree.

REASONS FOR GRANTING THE WRIT

I.

The Courts of Florida have refused to give full faith and credit to the prior decrees of the State of New York in violation of Article IV, Section 1, of the United States Constitution.

II.

The Courts of Florida have denied to the widow, Lucy C. Simons, her constitutional property rights to which she was entitled under the laws of the State of New York by the mere subterfuge of an ex parte divorce case in the Courts of Florida, where the Florida Court did not have jurisdiction because of the lack of proper residence.

In the case of *Gene Durfee et ux., Petitioners,* v. *Julia E. Duke,* decided December 2, 1963, 84 S. Ct. 242, 375 U.S. 106, this Court laid down certain basic constitutional provisions that are applicable to the case at bar. In the reported case in 84 S. Ct. 242, this Court determined certain fundamental principles of law. *Headnote 2* provides as follows:

> "Full faith and credit requires every state to give to a judgment at least the res judicata effect which the judgment would be accorded in the state which rendered it."

Headnote 3:

> "By constitutional provision for full faith and credit, local doctrines of res judicata become a part of national jurisprudence and are therefore federal questions cognizable before the Supreme Court."

Headnote 5:

"A judgment of a court in one state is conclusive upon merits in a court in another state only if court in first state has power to pass on the merits, but when second court's inquiry discloses that those questions had been fully and fairly litigated and finally decided in the court which rendered the original judgment, that judgment is entitled to full faith and credit."

In the body of the opinion as shown in the text at page 247 of the citation in 84 Supreme Court Reporter, this Court said:

"It is argued that an exception to this rule of jurisdictional finality should be made with respect to cases involving real property because of this Court's emphatic expressions of the doctrine that courts of one State are completely without jurisdiction directly to affect title to land in other States. This argument is wide of the mark. Courts of one State are equally without jurisdiction to dissolve the marriages of those domiciled in other States. But the location of land, like the domicile of a party to a divorce action, is a matter 'to be resolved by judicial determination.' Sherrer v. Sherrer, 334 U.S. at 349, 68 S. Ct. at 1090, 92 L. Ed. 1429. The question remains whether, once the matter has been fully litigated and judicially determined, it can be retried in another State in litigation between the same parties. Under the reason and authority of the cases we have discussed, it is clear that the answer must be in the negative."

A typical example of the fallacious reasoning of the Florida Court in this case is the application of the principles laid down by the District Court of Appeal of Florida, Third District, in the case of *Macfadden* v. *Muckerman,* Fla. App. 1959, 116 So.2d 448. This was a case involving a complaint in the nature of a bill of review to set aside a decree of divorce entered in the Circuit Court of Dade County, Flor-

ida, on January 9, 1946. The lower Court dismissed the suit without leave to amend. This suit involves an attack upon an original suit filed by Bernarr Macfadden in the Circuit Court of Dade County, Florida, and it was claimed in that suit that Bernarr Macfadden had been a bona fide resident of Florida for ninety days prior to the institution of the suit, while in fact at all times prior and subsequent to the filing of the bill for divorce the said Bernarr Macfadden had been a resident of New York. In this case the appellate Court held that no direct or collateral attack could be made with reference to that divorce decree, even if based upon an ex parte divorce proceeding, where the only service was by publication, unless it could be established that a deceased husband who had filed the suit had fraudulently kept the wife from contesting or defending the action or had kept her in ignorance of the proceedings, or was guilty of other misconduct which would deprive the wife of an opportunity to have defended the action.

We have submitted to the Florida Appellate Court that that decision is not applicable to the situation in this case, and even if it was it is a pronouncement of law which is in conflict with the constitutional provisions of the United States Constitution. We submit that it is contrary to other opinions of the Supreme Court of Florida and other opinions of the other two District Courts of Appeal sitting in Florida in other territories of this state.

We are not here concerned with the existence or non-existence of a divorce so far as the parties were concerned, because as in the Macfadden case Mr. Simons was dead before this suit was filed. In that particular Macfadden case there is no intimation that the then Mrs. Macfadden had a binding, conclusive decree of separate maintenance in her favor in New York.

For example, may we assume that Mr. Simons had never come into the State of Florida and that he had procured a divorce in the nature of what is commonly called a "Mexican divorce". The Florida cases are very clear that the Florida Courts do not have any assumed jurisdiction where the matrimonial domicile of the parties has been in another state and where the Courts of that state have entered a decree either for separate maintenance on a permanent basis or even divorce. Let us assume for the sake of argument that the New York decree had been one for divorce, with certain property settlements granted. Could Mr. Simons have then come into Florida, moved his intangible assets to Florida and then filed a suit in Florida for divorce based upon published or substituted service by publication and obtain a divorce in Florida against the wife? We think it very clear that the Florida Courts would have no right to upset or annul the property settlements fixed in the New York divorce decree. We say that there is no difference in the case at bar, because the litigation in New York resulted in a final separation of the parties in 1946. One of the property rights of the wife was the fact that upon his death she would still be his legal widow and entitled to her rights under the New York law.

In an opinion by the Supreme Court of Florida in 1950, *Gaylord* v. *Gaylord*, 45 So.2d 507, that Court as set forth in headnote 6 held:

> "Florida Court should not attempt to determine validity of a decree of a sister state or of a foreign country unless something appears on face of record which discloses its invalidity, and the most that Florida Court should do is to decide in proper cases whether foreign decree should be accorded recognition under full faith and credit clause or rule of comity."

Later in an opinion by the District Court of Appeal of Florida, Second District, 1961, in the case of *Edgar* v. *Edgar*, 126 So.2d 585, it appeared that Mrs. Edgar had filed a suit in the State of Maryland on February 26, 1948, in which she obtained a divorce and the husband was ordered to pay $35.00 per week to the plaintiff as maintenance and support for the three minor children. On October 15, 1958, the wife filed an action in the Circuit Court of Lake County, Florida, seeking the enforcement of the Maryland decree. The husband was personally served and contended that the Maryland decree was not entitled to full faith and credit in Florida. The lower Court ruled that that decree was still binding and entered a decree enforcing the same. The former husband appealed. On page 587 of the reported decision this Florida Appellate Court discussed the application of Section 1 of Article IV of the United States Constitution and made this finding, as contained in the second column, on page 587:

> "The object of the full faith and credit clause and the act of Congress which implements it is to insure that if a decree or judgment has a certain effect in the state in which it is rendered, it shall have the same effect in every other jurisdiction. In view of this objective, it is, therefore, clear that a state is not compelled by the full faith and credit clause to give a divorce decree of a sister state a greater effect than it has in the state granting the decree; but, of course, the full faith and credit clause does not preclude a court from extending to such a decree a greater effect than it has under the law of the sister state."

In the conclusion set forth in paragraphs 7, 8, on page 589 of the reported decision, the Second District Court of Appeal of Florida said this:

> "The Supreme Court of Florida has emphasized that this state has no desire to furnish a legal haven

for fugitive husbands; Sackler v. Sackler, 47 So.2d 292, 18 A.L.R. 2d 856, and we might well add to that expression of public policy that an attempt to escape responsibility to pay child support is looked upon with equal disfavor."

In a later case by the same District Court of Appeal of Florida, Second District, in the case of *Clarence A. Borst, Appellant,* v. *Anna Borst, Appellee,* 1964, 161 So.2d 693, it was held:

Headnote 1:

"Florida court was precluded, by due process of law requirements, from affecting, on application of former husband who resided in Florida, alimony rights vested in wife under foreign decree where marriage, divorce and alimony proceeding all took place outside of Florida and wife had not submitted herself to jurisdiction of Florida court."

Headnote 2:

"Former wife's vested rights to alimony under foreign decree were personal and subject only to in personam jurisdiction over her, and could not be affected by court which had no personal jurisdiction over her on any theory that former husband's proceeding for relief was in effect quasi in rem."

The said Court quoted with approval in this opinion from 17 Am. Jur., Section 987 (Am. Jur. 17A), and cited with approval from Section 987:

"The divorce court must have jurisdiction of the wife in personam in order to adjudicate or cut off her right to alimony. While a court may gain jurisdiction to grant a divorce by constructive service upon a nonresident wife, such service does not give it jurisdiction to adjudicate alimony rights, and so it is held that an ex parte divorce, obtained by the husband, does not

necessarily affect the right of the wife to alimony under the laws of another state, and any express or implied adjudication against her claim is void and will not be given effect by comity or under the full faith and credit clause."

Further quoting, the Court quoted certain excerpts from 17A Am. Jur., Section 988, as follows:

"The rule is that where a wife obtains a divorce a mensa or a judicial separation and an award of alimony in one state, another state cannot adjudicate or terminate the right unless it gains jurisdiction in personam over the wife. A judgment for alimony is a property right, intangible in nature, and jurisdiction over an intangible can only arise from jurisdiction over the person."

Then the Court proceeds to analyze (text, p. 695) certain opinions of this Court, as follows:

"There are a series of cases from the United States Supreme Court which we think are conclusive on the issue herein. It is only necessary to note herein what we consider a 'trilogy' of decisions on the subject. This 'trilogy' is composed of Estin v. Estin, 1948, 334 U.S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561; Armstrong v. Armstrong, 1956, 350 U. S. 568, 76 S. Ct. 629, 100 L. Ed. 705; and Vanderbilt v. Vanderbilt, 1957, 354 U. S. 416, 77 S. Ct. 1360, 1 L. Ed. 2d 1456."

The Florida Court has apparently acted upon the erroneous presumption that a service of process by publication or mailing from the Florida Court to a resident of New York is the equivalent of personal service. This is an erroneous conclusion and, as pointed out in the opinion in the case of *Borst* v. *Borst*, above cited, on page 695, the Supreme Court of the United States has settled that principle of law in the case of *Armstrong* v. *Armstrong*, 1956, 350 U.S. 568, 76 S. Ct. 629, 100 L. Ed. 705, in which

this Court (U. S. Supreme Court) re-applied the doctrine of *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L. Ed. 465.

In the petition for rehearing directed to the District Court of Appeal of Florida, Third District (see Appendix B), and in the petition for writ of certiorari directed to the Supreme Court of Florida, which was denied (see Appendix C), the petitioner has set forth in detail the conflicting Florida opinions and the opinions of this Court and it would only be repetitious for the petitioner to explain or argue—at least in this petition. We respectfully request the Court for general discussions to take cognizance of the authorities quoted in the petition for rehearing and in the petition for certiorari aboved referred to.

CONCLUSION

Inherent in any separate maintenance decree, particularly under the law of New York, two things are determined: (a) Permanent separation is ordered and alimony is awarded; and (2) the status of the wife as the lawful wife and lawful widow in the event of the husband's death is maintained.

Under the laws of New York where the husband resided at the time of his death, the title to all intangible property and the location or situs of that intangible personal property accompanies the person of the owner. This rule has been clearly enunciated by the Supreme Court of Florida in the case of *Beverly Beach Propreties* v. *Nelson*, 68 So.2d 604, *certiorari denied Rensta* v. *Beverly Beach Properties*, 75 S. Ct. 27, 348 U.S. 816, 99 L. Ed. 643.

In October, 1960, when Sol Simons died in New York, he was within the jurisdiction of the Courts of New York. He was bound by the alimony decree. He was the legal

husband of Lucy C. Simons on the date of his death and, conversely, she was his legal wife at the time of his death. The title and situs of his personal intangible property was subject to the laws of New York. Admittedly the right to alimony as such ceased with his death, but the property rights inherent under the laws of New York to the surviving widow were still in force and effect. These property rights were protected to her under the laws of New York and under the decree of separate maintenance which had been in effect since 1946. Could the husband or can the Florida executor void and cancel those inherent property rights of Lucy C. Simons simply by the fiction of the Florida divorce in 1952, in which Mrs. Simons was not personally served and in which she did not personally appear? We respectfully say that this is one of the most flagrant abuses in the otherwise confusing doctrines of conflicts between various states on matrimonial rights that we have ever seen. We respectfully urge that this Court take jurisdiction not only for the purpose of protecting the rights of Mrs. Simons, but to clear up the confusion which seems to be in existence in many states about this subject matter. If such an opinion and such a result which have come out of this case in the Florida Courts are to be allowed to continue, then certainly a chaotic condition will result. We respectfully say that the ultimate result of the Florida decisions is completely contrary to the prior decisions of this Court and should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1963

LUCY C. SIMONS,
Appellant,
vs.
MIAMI BEACH FIRST NATIONAL BANK, as Executor of the Estate of SOL SIMONS, Deceased,
Appellee.

Case No. 63-201

Opinion filed October 29, 1963.

An Appeal from the Circuit Court for Dade County, John J. Kehoe, Judge.

Ward & Ward; Montague Rosenberg; Charles Gertler, for appellant.

Sibley, Grusmark, Giblin, King & Levenson, for appellee.

Before CARROLL, PEARSON and HENDRY, JJ.

CARROLL, Judge.

Lucy C. Simons sued the executor of her deceased ex-husband, seeking to set aside his Florida divorce decree. From an adverse final decree she has appealed.

The wife had obtained a decree for separate maintenance with a support allowance in 1946 in New York. The husband sued for divorce in 1952 in Dade County,

Florida. The wife, then a resident of New York, was served by publication and received copies of the order for publication and the complaint. On advice of her attorney, she did not appear in the Florida divorce suit.

The husband was granted a final decree of divorce in his Florida suit on May 1, 1952. He continued to pay support money as previously ordered by the New York court until he died in 1960. His will was filed and probated in Florida. The wife sought dower in the probate court. When her application for dower met objection on the ground that she was not his widow, having been divorced, she filed this suit in the circuit court. In her complaint it was contended the Florida divorce decree obtained by the husband should be set aside for several reasons: (1) that the husband lacked the necessary Florida residence and had defrauded the court by falsely claiming residence, (2) that the New York separate maintenance decree was a bar to the divorce suit and that it was a fraud on the court for the husband to fail to disclose the earlier proceeding, (3) that the decree on its face showed want of jurisdiction, and (4) that after she received notice of the divorce suit the husband lulled her into inaction. The executor answered, and the cause was tried before the chancellor who found for the defendant and dismissed the suit with prejudice. The appellant argues the chancellor's adverse decision on those several contentions was error. On considering the arguments in the light of the briefs and record we conclude no reversible error has been shown.

By choosing not to appear in the Florida divorce suit the non-resident wife was precluded from filing suit years later to set aside the decree for matters which could have been litigated by her in defense of the divorce suit. She had due notice and opportunity to contest the hus-

band's allegations as to his jurisdictional residence and his asserted ground of divorce. If she had defenses to those matters it was her duty to assert them in the divorce suit, and the chancellor was eminently correct in holding she was not entitled to maintain the present suit to set aside the decree for those reasons. Mabson v. Mabson, 104 Fla. 162, 140 So. 801; Bernstein v. Bernstein, 160 Fla. 579, 36 So.2d 190; MacFadden v. Muckerman, Fla.App. 1959, 116 So.2d 448.

The prior New York separate maintenance decree was not a bar to a divorce suit by the husband, and his failure to disclose it in his complaint was not a fraud on the court. Matsis v. Matsis, 155 Fla. 786, 21 So.2d 545; Bernstein v. Bernstein, supra. Any affirmative defense the prior suit may have afforded should have been presented in the divorce suit. See Prall v. Prall, 58 Fla. 496, 50 So. 867, 26 L.R.A., N.S., 577; Bernstein v. Bernstein, supra; Gordon v. Gordon, Fla. 1952, 59 So.2d 40; Stone v. Stone, Fla.App. 1959, 111 So.2d 486; Taylor v. Taylor, Fla.App. 1961, 130 So.2d 115.

The basis for the contention that the decree showed want of jurisdiction on its face was because it incorrectly recited the defendant had answered. But the record indicates the chancellor was under no misapprehension as to nature and status of the case before him on final hearing. This is so because the master's report, which the court confirmed, showed the true situation in detail.

The appellant's claim that the husband, in 1952 after she had notice of his divorce suit, lulled her into inaction, was properly denied by the chancellor, for her delay (Barnes v. Willis, 65 Fla. 363, 61 So. 828) and on the merits. That issue was tried before the chancellor

in the instant case, in the course of which it was required that he judge the credibility of witnesses and resolve conflicts in the evidence, and his ruling thereon is adequately supported by the record.

For the reasons stated the decree appealed from is affirmed.

Affirmed.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

LUCY C. SIMONS,
Appellant,
vs.
MIAMI BEACH FIRST NATIONAL BANK, as Executor of the Estate of SOL SIMONS, Deceased,
Appellee.
Case No. 63-201

Petition for Rehearing and/or Clarification

Comes now LUCY C. SIMONS, Appellant, and respectfully petitions the Court to grant a rehearing and reconsideration of the opinion and decision of this Court filed October 29, 1963, and for clarification, and respectfully assigns the following reasons therefor:

The analysis by this Court as to the nature of the suit in our opinion does not encompass the real issues and the real purposes in the suit.

The decedent husband, SOL SIMONS, died in New York in 1960, domiciled and resident as contended in the complaint and in the testimony of the same matrimonial

domicile and the same apartment occupied by him in 1946 when the plaintiff successfully prosecuted a separate action for alimony, and for permanent separation, under the laws of New York. The same grounds of cruelty were alleged by the wife against the husband in that case, and he, in turn, made a claim that it was her fault, and alleged the same grounds of cruelty against her. Not being grounds for divorce under the laws of the State of New York, a permanent separation decree was entered in favor of the wife.

The husband died in New York City, and as contended in the complaint and in the evidence, he had never become domiciled in any other place than the same residence in New York City.

He had continued with his alimony payments up to the date of his death. Therefore, on the date of his death, under the laws of New York and under the particular statutes of New York, LUCY C. SIMONS was his surviving spouse. She was entitled to all of his estate if he left no issue or parent or brother, sister, nephew or niece. There was no issue of the marriage, and if he had left anyone in the class of a parent or a brother, sister, nephew or niece, she would have taken one-half of the entire estate, subject to a few minor adjustments if there were actual parents living as against brother, sister, nephew or niece.

Under the New York law, the surviving spouse could not inherit from the deceased sponse where there had been a divorce recognized as valid in New York, or where the wife (in this case) had procured a divorce at her instigation in another state. Under the New York law, a foreign ex parte divorce would be recognized in New York if adequate notice and opportunity to defend was given and plain-

tiff was domiciled in the foreign state, but the finding of domicile in the ex parte divorce proceedings in a foreign state may be readjudicated by the courts of New York unless both parties had appeared voluntarily in that other state.

The statutes are clear that foreign ex parte divorce may not cut off the wife's right to support previously established in New York. That was the theory upon which Lucy C. Simons, upon the death of her husband, her claimed husband, in 1960 filed her claim as the lawful widow in the Probate Court of Dade County, Florida.

Objections were filed by the executor on the ground that Lucy C. Simons was not the lawful wife of Sol Simons at the date of his death because of an ex parte divorce decree which had been entered in Florida in the Circuit Court of the 11th Judicial Circuit, in and for Dade County, Florida, in April of 1952.

The theory and purpose of the complaint in equity was not solely to set aside a divorce decree, but was for the purpose of impressing her claim as a lawful widow to her share of the estate which would be by virtue of either the dower statutes of Florida or her surviving spouse rights under the New York law. Thus there were important property rights involved.

The lower court dismissed the complaint on the ground that she had admittedly had some notice of the filing of the Florida divorce case in 1952, and that she had not entered this case in Florida, and that since the wife did not sustain the burden of proving that she had been lulled into inaction, that she had no right to question the jurisdiction of the court in Florida to have granted a divorce affecting her rights as a spouse, either by way of dower or widow's rights, relying chiefly if not in toto upon the decision by

this Court of *MacFadden* v. *Muckerman*, (1959), 116 So.2d 448.

No consideration appears to have been given by the lower court to the fact that Sol Simons, as claimed in the suit and we say supported by the testimony, was a continued resident of and domiciled in the City of New York from 1946 on through the date of his death in 1960; that he died in New York City; that he had never left New York City; that he had never legally maintained any residence or domicile in Florida even at the time when he sought the jurisdiction of the Florida Court in 1952; that he continued throughout the years in the same domicile in New York City, and that when he died there his property, particularly his intangible estate, was with the body in New York State, and that she was entitled to those property rights fixed under the New York Statutes.

In the defense of the case, the executor contended that the estate was a Florida estate, that Mr. Simons was a resident of Florida or domiciled in Florida at the time he filed his suit for divorce in 1952, and that he had maintained that residence or domicile in Florida up until the time of his death; that he had drawn a will in which he named the Miama Beach First National Bank as his executor.

There was adequate proof, in our opinion, to show that Mr. Simons was domiciled in New York at the time of his death; that there was nothing better than a fiction of domicile in Florida at the time of the filing of the divorce suit in 1952; that he was in Florida only as a sham, as far as domicile was concerned; that even though he was advised by his own then attorney that he would have to give up his residence in New York, he continued to maintain that same residence on Yellowstone Boulevard in Greater New York, carried on his business from that place,

never moved from those premises, was there during his last illness and died there.

There has never been any determination by the lower court as to the weight of the evidence in that regard, nor was there any determination by the lower court from the evidence as to whether in truth and in fact Mr. Simons was ever a bona fide resident or domiciled bona fide in Florida within the purview of our statutes and our laws in Florida, so as to give the Florida Court jurisdiction to entertain a divorce action.

The sole issue determined by the lower court was that under the doctrine as generally laid down in the said *MacFadden* decisions, supra, she had knowledge of the pendency of the action, and that she was forever barred from raising the issue as to that point, regardless of the fact that he may not have been a proper resident or domiciled properly in Florida.

The court below did not purport to pass upon her right under the New York Statutes to have her proportion of the estate, wherever it might have been probated, for the protection of her claims.

In this regard the opinion of this Court restricted its analysis to four points—

(1) that the husband lacked the necessary Florida residence and had defrauded the court by falsely claiming residence;

(2) that the New York separate maintenance decree was a bar to the divorce suit and that it was a fraud on the court for the husband to fail to disclose the earlier proceeding;

(3) that the decree on its face showed want of jurisdiction;

(4) that after she received notice of the divorce suit the husband lulled her into inaction.

We respectfully say that the only point the lower court passed on was the 4th point just mentioned, when the court below found that Mrs. Simons had received notice of the divorce suit, and that the husband had not lulled her into inaction.

The gist of this Court's ruling on the affirmance is contained on page 2, in which this Court said:

> "By choosing not to appear in the Florida divorce suit the non-resident wife was precluded from filing suit years later to set aside the decree for matters which could have been litigated by her in defense of the divorce suit."

In support of this finding, this Court quoted three decisions, the first from *Mabson* v. *Mabson*, 104 Fla. 162, 140 So. 801. Briefly analyzing the facts in the *Mabson* case, it appeared that both the husband and wife had their matrimonial domicile at Winter Haven in Polk County, Florida; that on March 30, 1927, the wife left the husband and went to New York; that on April 4, 1927, the husband instituted an action for divorce based upon the ground of adultery. The service was by publication. The wife did not appear. After the divorce decree was entered in Florida, the wife, still being in New York, instituted a suit against the husband for separate maintenance and support. This suit was based on personal service on the husband, but the New York Court decided against the wife on the ground that the matrimonial domicile of the parties was in Florida and not in New York at the time the New York suit was instituted, and that the wife could not ask the New York Courts to determine her matrimonial rights to alimony when she herself had left the matrimonial jurisdiction.

She then later filed a suit in Florida in the nature of a bill of review. That case was dismissed and the dismissal was affirmed by the Supreme Court of Florida. It was pointed out (804):

> "At the time the husband sued his wife for divorce, the circuit court of Polk county had potential jurisdiction of both the parties, because that was their matrimonial domicile. It also appears that such court had jurisdiction of the subject-matter, because the complaint alleged and proved was a ground for divorce which was cognizable only by the courts of this state in a suit brought in this state to assert it and obtain relief with respect to it."

The Court pointed out that she actually received a copy of the notice and (804):

> "* * * she deliberately elected to ignore whatever insufficiency appeared on the face of the order of publication, and to allow the divorce suit in Florida to proceed to decree against her without objection on her part, while she was attempting to perpetrate a fraud on the courts of New York in attempting to have those courts mulch the husband in alimony and counsel fees, which she must have known could not have been awarded to her, in view of the place of the matrimonial domicile and the charges made and pending in the Florida divorce suit."

The Florida Court based its affirmance of the Circuit Court decision largely on the doctrine that the wife had been guilty of laches, inequitable conduct and waiver. The question of the husband's domicile in Florida, or even the matrimonial domicile of both the parties, was not involved in the case.

We respectfully say that this opinion does not support the construction placed upon it in the opinion by this Court, and does not sustain the conclusions reached by this Court.

The next case referred to is *Bernstein* v. *Bernstein*, 160 Fla. 579, 36 So.2d 190. This was a 1948 opinion. Hyman Bernstein filed a suit in the Circuit Court of Dade County, Florida, before N. Vernon Hawthorne, Judge, against his wife, Betty Bernstein. This was a suit by publication of service, served upon the defendant Betty Bernstein, who was a resident of New York. The attorney for Betty Bernstein, a Mr. Samuel Flasterstein, filed a letter in the court detailing the facts of a support proceeding that took place in the Domestic Relations Court of New York, wherein plaintiff was required to pay the defendant $30 a week for support of herself and her minor child. The Supreme Court of Florida, in its opinion (p. 191) pointed out that the chancellor below treated this letter as an appearance for the defendant, and gave the plaintiff additional time to plead. The chancellor entered an order directing a writ of ne exeat to be issued against the plaintiff, and a rule to show cause why he should not be adjudged in contempt for concealing the facts relating to the support proceeding referred to. There was a hearing on this rule. The plaintiff was adjudged guilty of contempt and sentenced to 45 days in the county jail. The complaint was dismissed with prejudice.

On appeal, the Supreme Court of Florida reversed both decrees sending the case back for further proceedings. The effect of this decision was simply a holding by the Supreme Court of Florida that that support decree by the Domestic Relations Court of New York was not on its face a bar to a suit for divorce. The Court pointed out that it might be expedient for the complaint to recite any preceedings in a foreign court for support and maintenance, but that it was not essential, and that such proceedings were matters of defense. They pointed out that since the lawyer had made these facts known to the court by

his alleged appearance and letter, the chancellor was free to consider them and make such decree for the defendant as he might deem advisable. The Court held that there was no basis for the contempt.

This was the sole determination in this case. The question of inherent domicile was not involved, nor was the jurisdiction of the Florida Court based upon the residence requirements involved in the case.

The last case referred to in support of this Court's opinion was *MacFadden* v. *Muckerman,* (Florida Appellate, 1959) 116 So. 2d 448. We have thoroughly expressed our analysis of the *MacFadden* case and have urged our construction of it, as reflected on page 15 of appellant's main brief, when we attempted to point out to the Court that the facts in the *Muckerman* decision can be distinguished, and that if construed as it had been construed by the lower court, it would be in direct conflict with the decisions of the Supreme Court of Florida in the case of *Chisholm* v. *Chisholm,* a 1929 decision, 125 So. 694, and *Dye* v. *Dolbeck,* 154 So. 847, and the later decision of *Kelly* v. *Kelly,* 75 So. 2d 191, a 1954 decision.

We respectfully contend that the doctrine of the Supreme Court of Florida, as represented by these decisions, does not preclude any spouse, or even an heir of that spouse, if the spouse is deceased, from questioning the jurisdiction of the Florida Court because of lack of domicile of the plaintiff in an ex parte divorce case. For the sake of argument, we will concede that this rule would apply if the only grounds asserted by the non-appearing spouse would be the question of sufficiency of the testimony covering the grounds of divorce, but we specifically urge that any conduct on the part of the wife, other than actual fraud or bad faith, would ever prohibit her from filing a

suit to make a direct attack upon the ex parte divorce on the sole ground that the husband lacked the necessary Florida residence.

We recognize that that is the implication which arises from the *Muckerman* decision, but we respectfully say that that is in direct conflict with the *Chisholm* v. *Chisholm* decision, supra, which point we specifically mentioned on page 18 of appellant's brief. In that opinion the Supreme Court of Florida did say that in a subsequent suit the defendant should not be held to question the sufficiency of the evidence adduced in support of the ground of divorce urged in the bill, but the reversal in that case was based upon this statement (125 So. 694, 704):

> "The jurisdictional infirmity because of complainant's lack of residence in Florida, however, is fatal to the decree, notwithstanding defendant's inattention to the suit."

On page 3 of the Court's opinion, this Court also points as authority several other decisions which we have not previously discussed. The first is *Matsis* v. *Matsis,* 155 Fla. 786, 21 So. 2d 545. This case was discussed fully at pages 18 and 19 of appellant's brief and may be distinguished. In the *Matsis* case, the husband had entered into a stipulation and a property settlement agreement which was presented before the Court and allowed. Thereafter the wife sought to set aside that settlement because she claimed it was unfair to her. The question of the jurisdiction of the court and the domicile of the party bringing the suit was not present.

This Court in its opinion then refers (p. 3) to *Prall* v. *Prall,* 58 Fla. 496, 50 So. 867. In this case (a 1909 decision by the Supreme Court of Florida) it appeared that John M. Prall filed a suit in Hillsborough County for divorce

against his wife, Emma L. Prall. The complaint alleged that in 1907, or some year prior thereto, he had filed a suit in the Circuit Court of Hillsborough County against his wife, got personal service, that she filed an answer waiving her right to take testimony and contest the same, and on the 2nd day of December, 1908, a decree of divorce was granted; that the defendant had made additional demands for moneys and property, and when he refused, that she filed an appeal from the decree of the Circuit Court. which ended on a reversal of the decree on the ground that there was no sufficient proof submitted.

He complained, however, that he was not given the right to amend or put on additional testimony, and hence he had to bring the second suit. The wife, through her counsel, then moved to dismiss the second suit and filed a plea setting up all of these matters. When this plea of res judicata was overruled, the defendant appealed solely from the order overruling the plea.

The Supreme Court pointed out that the first suit between the parties was for divorce upon statutory grounds of habitual indulgence by the defendant in violent and ungovernable temper. The trial court granted the divorce upon those allegations and proof, and the Supreme Court held that the allegations of facts were insufficient to state a cause of action, and that the complaint was not sustained by the facts, and that the proofs were insufficient.

The Court pointed out that the second suit was for divorce upon standard grounds of extreme cruelty, and pointed out that it was not the same cause of action, and that there were different facts alleged. The cause was simply sent back for further proceedings. There was no question in the case, so far as we can see, that would be applicable to or the authority for the situation discussed in the case at bar.

This Court has apparently construed these opinions as concluding the law of Florida that any defense or any claim made as to the invalidity of a divorce decree based upon service by publication, is barred unless it is brought as an affirmative defense in the action then pending. We say, respectfully, that these decisions collected do not appear to uphold that doctrine. The *Prall* case, does not uphold that doctrine, but the decision was somewhat to the contrary. The Court permitted the second case for divorce, but on different grounds.

In the case of *Gordon* v. *Gordon*, 59 So.2d 40, it appeared that in a reported case—160 Fla. 838, 36 So.2d 774, 4 ALR 2d 102, the Supreme Court of Florida had held that the proceedings in Pennsylvania were a bar to a subsequent proceeding in Florida. There is an extensive note by the authors of ALR appended to the decision (see 4 ALR 2d 102). In the original case, which was before the Circuit Court of Dade County, Florida, the Honorable Charles A. Carroll, Judge, the lower court had granted a divorce in favor of the wife. She brought her suit in Dade County, and it appeared that on January 18, 1946, she had brought an action for divorce on the ground of indignities to her person against the husband in Pennsylvania. Process was duly served. The husband appeared, filed his answer and the cause was then ready for trial. On June 25, 1946, the wife visited Miami Beach, Florida, and on September 30, 1946, notwithstanding the pendency of the action for divorce in Pennsylvania, she instituted a suit in the Circuit Court of Dade County, Florida. Service in this case was obtained on the husband by publication, but he filed his appearance in the action, and filed his answer to the plaintiff's bill of complaint. The issue being joined in Florida, a Special Master was appointed to take the testimony.

The plaintiff then petitioned the Pennsylvania Court for leave to discontinue her action for divorce, but that court denied it, and a Master was appointed in that court in May of 1947.

The Florida Master took testimony, and the Master's recommendation was that she be granted a divorce upon the charge of extreme cruelty. Then it appears that the Pennsylvania proceeding continued by the order of the court, but that the wife did not appear. The husband appeared in that case and gave voluminous testimony. That case was dismissed in favor of the defendant, the husband. This was in May or June of 1947. When that decree was obtained, the husband on July 9, 1947, filed his motion to dismiss the Florida complaint on the grounds that the issue between the parties had been settled against her contention in Pennsylania, and the Pennsylvania decree was entitled to full faith and credit under the provisions of Section 1 of Article IV of the Constitution.

The wife filed a motion to strike this plea of res judicata. The plea of res judicata was denied by the chancellor, and the court entered a final decree in favor of the appellee against the appellant, dissolving the bonds of matrimony.

The question presented to the Supreme Court of Florida on the first appeal is whether the chancellor had erred in failing to give full faith and credit to the final decree entered by the Pennsylvania Court. The question finally determined was that the two causes of action were identical, and the Supreme Court of Florida, through opinion rendered for the court by Mr. Justice Hobson, reversed the chancellor and remanded the case for further proceedings. Apparently when the case came back before the lower court, the husband then filed an answer in which he spe-

cifically pleaded the final decree rendered by the Pennsylvania Court rather than raising the question by motion. The Circuit Court permitted the wife to amend her pleadings and asserted that the husband had not only been guilty of extreme cruelty, but had been guilty of desertion. Based upon the new issues raised, the chancellor granted a decree in favor of the wife, notwithstanding the opinion in the first case by the Supreme Court finding that there was a different cause of action now alleged.

In this opinion on appeal to the Supreme Court (59 So. 2d 40) the amendment was treated as a new suit, and the Supreme Court held that the new suit did present new charges, new grounds for divorce, and was not barred by the Pennsylvania decree, and concluded that the Pennsylvania decree should not be held to operate as res judicata, nor should it be held to work as an estoppel by judgment because the doctrine of constructive desertion was not the same thing as was decided in the Pennsylvania Court.

The lower court in the case at bar did not see fit to settle any of those issues, although they were raised in the complaint and in the testimony. In this case, Mrs. Simons contended that the permanent separate maintenance decree in New York in which the husband was personally served, and which was held in the matrimonial domicile of the parties, was conclusive and was res judicata on the grounds for divorce with reference to claims for cruelty on the same facts and same charges as were involved in that case in New York. However, apparently the lower court said that did not make any difference, because if she had such a claim to make, she should have come into the Florida Court in 1952 and raised those questions, even though proceedings were pending in New York on additional pleadings at the time Mr. Simons filed his complaint for divorce in Florida in March of 1952.

The impact of these cases may have a collateral effect on this decision should this Court send the case back for further consideration, but we respectfully say that the Court either overlooked or failed to consider that the sole disposition of this case by the lower court was based upon the fact that since Mrs. Simons knew about the Florida case and did not appear, she was forever precluded from raising any kind of question about the validity of that divorce.

This Court also quoted *Stone* v. *Stone*, Fla. App. 1959, 111 So. 2d 486, an opinion by the District Court of Appeal of Florida, Third District, prepared by the Court by Honorable Charles Carroll, Chief Judge, who prepared the opinion in the case at bar.

In the *Stone* case, Morris S. Stone sued his wife, Evelyn L. Stone, for divorce in the Circuit Court of Dade County, Florida, alleging as grounds habitual indulgence in violent and ungovernable temper and desertion. The wife entered her personal appearance and counterclaim for separate maintenance, charging desertion. The court denied relief to either of the parties, and there was an appeal by both parties.

It appeared from the opinion (488) that Morris Stone had previously filed a suit for divorce against the wife in Ohio. His grounds alleged there were cruelty. Her cross-claim for separate maintenance was based upon a claim of desertion. The Ohio Court, after hearing the testimony, dismissed both claims.

In the Florida complaint filed thereafter, Morris Stone did not repeat his charge of cruelty but sued on separate grounds of habitual indulgence in violent and ungovernable temper and desertion. The wife filed her answer and

counterclaim charging Morris Stone with desertion and seeking separate maintenance.

This Court, speaking through Chief Judge Charles Carroll, held that the first suit was not conclusive as to the different causes of action in the second suit, and the case was sent back for trial on the claim by Morris Stone against Evelyn Stone, consisting of the claim of habitual indulgence in violent and ungovernable temper and desertion. The Court held, however, that the wife's counterclaim based upon desertion only, and being the same as she had filed in Ohio, was barred.

This case may be pertinent if the lower court had considered or made any findings or ruling upon the res judicata effect of the New York decree, but the case, in our opinion, is not authority for anything that has been passed upon by the lower court. It is true that we have argued in our briefs that the claims made by the husband in New York were identically the same claims which he made in Florida in 1952. The separation decree was entered in New York in 1946, and there were no additional grounds asserted. This is pertinent, but is not directly applicable in view of the lower court's ruling and the affirmance by this Court that any defense or any claim of irregularity filed by Mrs. Simons was barred because she had not come into the Florida case, and that she was forever foreclosed.

We respectfully say that the Court has narrowed the issues in the case far below what the real issues should be. We again contend, and respectfully urge to the Court, the consideration of the doctrine of the *Chisholm* case and other cases which we have mentioned, and contend that the lower court should have made a ruling one way or the other on the sufficiency of the evidence as to whether or not the husband, Sol Simons, had established sufficient evidence of domicile in this state so as to give the Florida Court juris-

diction in 1952 even over the husband to award a divorce on substitute service. It is one thing to say that the wife could not even present that evidence unless she showed that she had been lulled into inaction by her husband, which was the sole ground for the ruling of the lower court, and on the other hand to say that he had considered all of that evidence, and made a specific finding that Sol Simons was a resident of Florida for 90 days next preceding the filing of the suit in March of 1952, or that he continued to be a resident of Florida and domiciled in Florida up to the time of his death in December, 1960.

We raised the question in the lower court and also in this court that the full faith and credit clause of the constitution of the United States pertaining to judgments of other states also required this Court to pass upon and make a definite ruling upon the issues framed by the complaint and the answer. We contended in the complaint, established by the evidence, that Mr. Simons was a continuous resident of New York City; that he maintained a continuous domicile in his apartment on Yellowstone Boulevard from prior to 1946 until the date of his death in 1960; that he maintained his residence there, his place of business there, maintained his automobiles there. There was never any break in his residence in New York.

We asserted in our briefs as authority, that regardless of the validity of a Florida divorce, as far as the matrimonial affairs of the parties were concerned, that it did not and could not affect the personal rights of the parties, or defeat her claim as the surviving spouse under the law of New York, particularly on his intangible property, the title and possession of which followed his person. We respectfully say that the Court below and this court should have found that her claim as a spouse under the New York law could not have been discharged or abro-

gated; that she was his wife in New York up to the time of his death, and that she is still his legal wife as far as New York is concerned. The fact that the property of the estate, which consisted entirely of intangible properties, was purported to have been transferred to Florida simply by the appointment of a Florida banking corporation as executor, does not change the real domicile.

We have previously in our briefs referred to numerous decisions, including Federal Supreme Court opinions. In addition to the Supreme Court of the United States opinions which we quoted at great length in our briefs, we refer this Court to annotations on this subject contained in 168 ALR beginning at page 793, which cover the question of dower rights as affected by divorce in another state or country.

In our previous briefs we referred to the *Pawley* decision, Supreme Court of Florida, 46 So. 2d 464, which is also carried at 28 ALR 2d 1358. Beginning at page 1378 is an extensive note upon the validity of a foreign divorce granted upon constructive service and precluding action by the spouse for alimony, support or maintenance.

It is clear that under these decisions which we have pointed out, we feel sufficiently, in our original briefs, that under the doctrine laid down by the United States Supreme Court in the various decisions, a husband cannot in the face of an alimony decree for perpetual and separate maintenance in the State of New York, then leave the matrimonial state while he is continuing in the litigation in New York State, set up a purported residence in Florida, obtain an ex parte divorce decree in Florida without any appearance by the wife, go back to New York and spend the last eight years of his life in New York State, continuing his alimony payments in New York State

to the date of his death, die in New York, his whole estate consisting of intangible personal property which follows his body and is in his possession wherever he is, and then totally avoid any liability to his wife by simply drawing a will and appointing Florida executors.

The clearest exposition of the wife's right in such a circumstance is set forth in one of the latest opinions on this subject by the Supreme Court of the United States in the case of *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416, 77 S. Ct. 1360. In this case the husband and wife separated while they were domiciled in New York. The husband then went to Nevada and secured a divorce in which the wife was not personally served in Nevada, nor did she appear in that court. The Supreme Court of the United States held that such a Nevada divorce Court had no power to extinguish any right which the wife had under the law of New York to financial support from her husband.

In the body of the opinion, the court again cited the *Estin* v. *Estin* case, 334 U.S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561, 1 ALR 2d 1412, which we have relied upon in our main brief. The Court concluded by saying (1362):

> "It has long been the constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. Here, the Nevada divorce was as powerless to cut off the wife's support right as it would have been to order the husband to pay alimony if the wife had brought the divorce action and he had not been subject to the divorce court's jurisdiction."

The Court said further (1363):

> "Petitioner claims that this case is governed by Thompson v. Thompson, 226 U.S. 551, 33 S. Ct. 129, 57 L. Ed. 347. For the reasons given in a concurring opinion in Armstrong v. Armstrong, 350 U.S. 568, 575,

at 580-581, 76 S. Ct. 629, 636, 100 L. Ed. 705, the Thompson case, insofar as it held that an ex parte divorce destroyed alimony rights, can no longer be considered controlling."

The dissenting opinions in this case by Justice Frankfurter, beginning at page 1363, and the one by Justice Harlan, beginning page 1367, fully point out just what the majority of the court held. This may be concluded by the statement by Justice Harlan when he said (p. 1367):

> "The Court holds today, as I understand its opinion, that Nevada, lacking personal jurisdiction over Mrs. Vanderbilt, had no power to adjudicate the question of support, and that any divorce decree purporting so to do is to that extent wholly void—presumably in Nevada as well as in New York—under the Due Process Clause of the Fourteenth Amendment, pursuant to the doctrine of Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565."

He further points out (p. 1368) that even though the majority opinion designated the rights of the wife as property rights, that he sees no reason why Nevada cannot adjudicate the incidence of the marital statutes.

We are not purporting to re-argue this case, and we are quoting this decision, which we did not quote in our original brief, to show the construction placed by the Supreme Court on the *Armstrong* case and the *Estin* case, which we did rely upon in full. We think there is a very strong constitutional question involved, and we sincerely and earnestly seek a reconsideration by this Court of its opinion. We respectfully say that this cause should be sent back to the lower court under the doctrine of the *Chisholm* case and other cases which we have referred to, so that, among other things, the lower court can determine, or is permitted to determine, the merits as to

whether Mr. Simons ever had a sufficient domicile in Florida to give the Florida Court its required jurisdiction. That is the first point that ought to be decided, because it is true that would be decisive of the whole case.

On the other hand, there are also these other important property rights and constitutional rights, as to whether this wife can be deprived of her property rights when her husband died as a husband and domiciled in New York City, simply upon a claim by a local bank serving as an executor of his estate. There is no question but what, if this estate is probated in New York State, as it should have been, that the wife's interest would have been fully protected. Can her rights be defeated by the mere surface scheme of allegedly transferring these assets as of date of death to Florida?

These are points that ought to be decided by this Court, but they have not yet been passed upon by the lower court in view of the restricted phase of its ruling.

Respectfully submitted,

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By /s/ W. G. WARD
W. G. WARD, of Counsel
Attorneys for Plaintiff, Lucy C. Simons, Appellant Herein.

I hereby certify that copy of the foregoing petition for rehearing and for clarification was this 13th day of November, 1963, mailed to counsel for the appellee, Messrs. Sibley, Grusmark, Giblin, King & Levenson, 605 Lincoln Road, Miami Beach, Florida.

/s/ W. G. WARD
W. G. WARD

APPENDIX C

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1963
FRIDAY, NOVEMBER 22, 1963

LUCY C. SIMONS,
Appellant,
vs.
MIAMI BEACH FIRST NATIONAL BANK, as Executor of the Estate of SOL SIMONS, deceased,
Appellee.

Case No. 63-201

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

WILLIAM P. CARTER
Clerk District Court of Appeal, Third District
By /s/ Louis J. Spallone
Chief Deputy Clerk

(Seal)

APPENDIX D

IN THE SUPREME COURT OF FLORIDA.

LUCY C. SIMONS, a widow,
Petitioner,

vs.

MIAMI BEACH FIRST NATIONAL BANK, a banking institution organized and existing under the laws of the United States, with its principal place of business in the City of Miami Beach, Dade County, Florida, as Executor of the Estate of SOL SIMONS, deceased,
Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District

TO THE SUPREME COURT OF THE STATE OF FLORIDA:

Petitioner, Lucy C. Simons, presents this, her petition for a writ of certiorari, and states:

1. Petitioner seeks to have reviewed a decision and mandate of the District Court of Appeal of Florida, Third District, opinion filed October 29, 1963, order denying petition for rehearing filed November 22, 1963.

2. This petition is presented under and pursuant to Article 5, Section 4 of the Florida Constitution, and Rule 4.5c of the Florida Appellate Rules.

3. This petition is accompanied by a partial certified transcript of the record of the proceedings, including the decision petitioner seeks to have reviewed, and a supporting brief.

4. The following are the pertinent or controlling facts:

(a) On February 23, 1962, petitioner filed a suit in the Circuit Court for the 11th Judicial Circuit, in and for Dade County, Florida—chancery number 62C 1980. The case was assigned to the Honorable John J. Kehoe. The complaint is shown R. 1-24.

(b) The complaint showed that Sol Simons had married the petitioner, Lucy C. Simons, sometime prior to 1946; that in 1946 Lucy C. Simons had filed a suit in the Supreme Court of the State of New York against Sol Simons, seeking a decree of permanent separate maintenance on the ground of cruelty. This resulted in a final decree of separate maintenance on said grounds in favor of the plaintiff wife, the petitioner herein, Lucy C. Simons (R. 8). The actual decision of the New York Court was attached as an exhibit to the complaint (R. 19).

(c) It is alleged in the complaint that the parties had been living in New York since their marriage in 1941; that at the time of the separation the parties lived in New York; that both parties were present in the New York Court in a hotly contested separate maintenance action; that the wife was successful; that she was awarded approximately $500 per month, which alimony was paid; that Sol Simons continued to live in the home or apartment where the parties had resided for many years as their matrimonial domicile; that from 1946 to the date of his death in New York City in 1960, he continued to live at the same place in New York City; that he continued to keep up his alimony or support payments under the New York decree, and that when he died, he was a resident of New York.

(d) It is further alleged that Lucy C. Simons under the law of New York was his widow and entitled to dower.

(e) The complaint shows that Sol Simons had come to Florida and had obtained a divorce by ex parte divorce

proceedings in the Circuit Court of Dade County, Florida, final decree being entered May 1, 1952 (R. 17). The decree on its face recited that the case was heard upon the bill of complaint, the defendant's answer and the report of the Special Master.

(f) It is charged in the complaint, all as analyzed in the opinion of the District Court of Appeal of Florida, Third District—(1) that the husband lacked the necessary Florida residence and had defrauded the court by falsely claiming residence; (2) that the New York separate maintenance decree was a bar to the divorce suit and it was a fraud on the court for the husband to fail to disclose the earlier proceeding; (3) that the decree on its face showed want of jurisdiction; (4) that after she received notice of the divorce suit, the husband lulled her into inaction.

(g) A motion to dismiss the complaint was filed, and was overruled (R. 27).

(h) The answer of the Miami Beach First National Bank, as Executor, was filed (R. 28), and the issue raised was based solely upon the ground that the divorce suit in Florida based upon the ex parte decree in 1952, completely severed or discharged any right or claim of dower which Lucy C. Simons had in the Estate of her husband at the time of his death in 1960.

(i) As pointed out in the opinion of the District Court of Appeal of Florida, Third District, there were four grounds for attack, but the lower court, after overruling the motion to dismiss the complaint, and hearing substantial testimony and considering numerous exhibits, did not purport to pass upon the weight of the testimony except insofar as it applied to the fourth point, that is to say, that the wife had been lulled into inaction after she had received notice of the filing of the Florida action.

(j) It has been admitted throughout the proceedings that Mrs. Simons did receive a copy of the notice of the filing of the suit in Florida under the usual form of service by publication and by mail. She did contend that after she received that notice she had a discussion with her husband in New York City, and that he had advised her that the Florida proceeding would be dismissed. It was shown that during the time the proceeding was pending in Florida, the husband was personally present and was a part of an amendatory proceeding in the Courts of New York wherein the wife was asking for additional alimony.

(k) On this phase of the case, and that phase only, the lower court, Honorable John J. Kehoe presiding, entered his order on the 30th day of January, 1963 (R. 34), based solely upon the fact that Lucy C. Simons had not sustained the burden of proof of showing that she had been lulled into inaction after she had notice of the divorce suit. Page 845 original record, see excerpt supplemental record.

(l) The lower court did not pass upon the contentions (1) that the husband lacked the necessary Florida residence and had defrauded the court by falsely claiming residence; (2) that the New York separate maintenance decree was a bar to this suit in Florida and was a fraud upon the court in Florida; (3) that the decree on its face showed want of jurisdiction. These points have never been passed upon by the lower court.

5. (a) All of the essential factual matters that are necessary for this Court to determine, whether there is a conflict in this opinion with previous opinions of this Court, are contained in the opinion of the District Court of Appeal itself. The Court points out (157 So. 2d 200) that the wife had obtained a decree for separate maintenance with a support allowance in 1946 in New York. The opinion

points out that the husband sued for divorce in 1952 in Dade County, Florida, and that the wife was served by publication and received copies of the order for publication and of the complaint, and on the advice of her attorney in New York, she did not appear in the Florida divorce case.

(b) The opinion then points out that the divorce in Florida was granted on May 1, 1952, and that the husband continued to pay the support money as previously ordered by the New York Court until he died in 1960. They point out that the will was filed and probated in Florida, and the wife sought dower in the Probate Court of Dade County, Florida.

(c) What is not pointed out in the opinion is that he died while a resident of the City of New York in the State of New York; that under the law of the State of New York she was his widow and entitled to widow's rights, whether it be dower or otherwise. The opinion did not disclose that the testimony showed that the alleged residence of the husband in Florida in 1952 was a mere sham and subterfuge; that the wife had met the burden of proof in the New York case in 1946 with reference to her allegations on the grounds of cruelty; that the actual findings of the lower court, Honorable John J. Kehoe, had been strictly restricted to the question as to whether the husband had lulled her into inaction.

(d) The Chancellor had before him the question as to whether under the decisions of the Florida Appellate Court, Third District, 1959, of *MacFadden* v. *Muckerman*, 116 So. 2d 448, a wife was barred from attacking a Florida divorce decree based upon service by publication if it could be established that she ever received service or otherwise had knowledge of the pendency of the case.

(e) The controlling issue in this case which must first be determined, and which we say is in conflict, is that part of the opinion of the District Court of Appeal of Florida, Third District, now under attack (157 So. 2d 199, 200), wherein that Court said:

> "By choosing not to appear in the Florida divorce suit the non-resident wife was precluded from filing suit years later to set aside the decree for matters which could have been litigated by her in defense of the divorce suit. She had due notice and opportunity to contest the husband's allegations as to his jurisdictional residence and his asserted ground of divorce. If she had defenses to those matters it was her duty to assert them in the divorce suit, and the chancellor was eminently correct in holding she was not entitled to maintain the present suit to set aside the decree for those reasons."

quoting certain Florida decisions, including the decision by the District Court of Appeal, Third District, of *MacFadden* v. *Muckerman*, mentioned above.

The Court then found:

> "The prior New York separate maintenance decree was not a bar to a divorce suit by the husband, and his failure to disclose it in his complaint was not a fraud on the court. * * * Any affirmative defense the prior suit may have afforded should have been presented in the divorce suit."

Then the Court said:

> "The basis for the contention that the decree showed want of jurisdiction on its face was because it incorrectly recited the defendant had answered. But the record indicates the chancellor was under no misapprehension as to nature and status of the case before him on final hearing. This is so because the master's

report, which the court confirmed, showed the true situation in detail."

(f) We point out to the Court that the only point the lower court had passed on was that the plaintiff could not come into equity if she had knowledge of the first divorce suit while she was a resident in New York. The two points which are mentioned by the Appellate Court were not passed upon by the lower court at all.

(g) The controlling issue is the final holding by this decision of the Third District that no matter how bad or how defective the proceeding in Florida brought by the husband was, no matter if it clearly disclosed that the husband did not have any jurisdiction or any residence in Florida to give jurisdiction, that no matter how fraudulent the proceedings were, the wife had to answer the summons by substituted service, and raise all of those questions or she was forever barred.

(h) We think this Court will immediately see that there has been given a judicial and legal effect to a service by publication or by mail service, far greater than is even afforded to personal service upon an alleged defendant under the Florida law.

(i) To this extent, and as we have charged and explained in the briefs, this decision violates and is in direct conflict with the several opinions by the Supreme Court of Florida, beginning with the case of *Chisholm* v. *Chisholm*, 125 So. 847; *Kelly* v. *Kelly*, Supreme Court of Florida, 75 So. 2d 191. Although these cases and many others in Florida were clearly presented to the Court, the opinion of the District Court of Appeal does not reflect any attempt by the Court to distinguish those cases. The opinion under attack simply holds unequivocally that any knowledge Mrs. Simons had of the pendency of the Florida case

required her to come into Florida and defend that case, or be forever barred.

(j) In these cases, which we will discuss in the supporting brief, this Court has definitely held that where there is a jurisdictional infirmity because of the plaintiff's lack of residence in Florida, that that fact is fatal to the decree, and that the decree is void, not merely voidable, and is not binding upon the other party who has simply been served with process but has never appeared.

(k) In the case of *Kelly* v. *Kelly*, 75 So. 2d 191, which we will further discuss in our brief, this Court held that where the wife waited practically two years to file a suit to set aside a divorce decree in favor of her husband in Florida, there was no laches, in the absence of a showing of legal injury, embarrassment or disadvantage to the husband.

(l) We have not attached to the certified copy of the record at this stage of the proceeding the rather lengthy transcript of the actual testimony, and the exhibits in the Circuit Court action, or the record and exhibits which were forwarded to the Appellate Court. We respectfully request that under the provisions of Rule 4.5 Appellate Procedure, last paragraphs of subdivision c, that if this Court determines to entertain the petition for certiorari, that it will then enter such additional order as it may deem fit and proper with reference to further briefs or further records.

(m) As an additional or collateral factor, the District Court of Appeal in its opinion did not purport to even pass upon another controlling feature of the law. The main purpose of the proceeding in the Circuit Court was to establish the widow's right to dower in the estate of Sol Simons. When Sol Simons died in New York City while

a resident, as we contend, of the State of New York, Lucy C. Simons was his legal widow. She had been declared to be entitled to a separate maintenance decree on the same grounds which would have constituted her right for divorce in Florida, had the parties been residents in Florida, that is to say, extreme cruelty. The parties had not lived together since 1946, and there could not have been any grounds of matrimonial cruelty as between the parties since 1946 because they had not purported to live together as husband and wife. Mrs. Simons had a property right as the widow of Sol Simons. This was a right guaranteed to her under the Constitution of the United States, which requires that full faith and credit be given to the decrees of the courts of a sister state. These fundamental rights are an essential part of a constitutional guaranty, and raise not only a problem for this Court to pass upon, but raise a federal question. The decree of the New York Court is res judicata and is binding on any court of the land.

(n) For a recent exposition of the law on this question, we refer this Court to the recent opinion of *Durfee* v. *Duke*, December 15, 1963, Advance Sheet, Supreme Court Reporter, 84 Supreme Court 242, decided December 2, 1963.

(o) In the *Durfee* v. *Duke* case, the Supreme Court of the United States was involved with a question of full faith and credit, and validity of a judgment by the Supreme Court of Nebraska, upholding the title of Nebraska citizens to a strip of land formerly in the State of Missouri, and south of the channel of the Missouri river, the dividing line; as against the claim of the former owners of the property, who lived in Missouri, and who owned the land formerly in Missouri. The Federal Courts of Missouri, including the U. S. Court of Appeals for the Eighth Circuit, held that the Nebraska Court had no jurisdiction. The Supreme Court

of the United States granted certiorari, and held that even if it did not have actual jurisdiction over the res the fact that the Missouri parties went into the Nebraska Court, made that decree res adjudicata as between the parties but not in settling the boundary line between the States. The Court referred to *Sherrer* v. *Sherrer*, 334 U.S. 343, 68 Supreme Court 1087, 92 L. Ed. 1429. It held that although the divorce doctrine had not been applied to land titles, and this was a case of first impression, the appearance of the parties in Nebraska Court where the issues were determined, was final, and all other Courts thereafter had to recognize it. In the Sherrer case, which involved a Florida divorce, where the Probate Court of Massachusetts refused to recognize it, the Supreme Court of the United States held in effect that the personal appearance of both spouses in Florida and contested in Florida, could not be relitigated, and distinguished the case of *Williams* v. *North Carolina*, 325 U.S. 226, 65 Supreme Court 1092, 89 L. Ed. 1577, 157 A.L.R. pointing out that the doctrine of the Williams case was still law because in the Williams case one of the spouses did not appear in the State Courts of Nevada. See page 1090 of 68 Supreme Court Reporter. On page 1091 in the same Sherrer case, the Supreme Court distinguished the Sherrer case with the previous opinion of the Supreme Court of *Andrews* v. *Andrews*, 188 U.S. 14, 23 Supreme Court 237, 47 L. Ed. 366. In that case the husband, who had been domiciled in Massachusetts, instituted a divorce action in South Dakota. The wife first appeared by counsel in the South Dakota Court, and then pursuant to a consent agreement between the parties, withdrew her appearance. Nevertheless the South Dakota Court entered a divorce decree. After the divorce the husband returned to Massachusetts (just like the case at bar where Mr. Simons immediately returned, if he had ever left New York). Mr. Andrews remarried, and then died while he was in Massa-

chusetts. The Massachusetts Court in the Probate proceeding held that the South Dakota decree of divorce was void as to the property rights, and held that the first wife was entitled to the estate, as against the claim of the second wife. This was appealed to the Supreme Court of the United States and affirmed. The effect of the Durfee decision if applied to the Simons case would result in the conclusion that the decree in the contested separate maintenance case in New York in 1946, where Mrs. Simons was granted a permanent separation with alimony for life, and upon Simons death establishing her status as his widow, is res adjudicata, and a Florida divorce thereafter granted on the same issues without the personal appearance of the wife in Florida, would be a nullity on the property rights of the wife.

See also *Armstrong* v. *Armstrong*, 350 U.S. 568, 76 Supreme Court 629, 99 L. Ed. 1248, 123 N.E.2d 267. This case arose from an ex parte divorce decree in the Circuit Court of Dade County, Florida, where the Ohio Supreme Court applying the doctrine in the case of *Pawley* v. *Pawley*, 46 So. 2d 464, held that the ex parte divorce decree in Florida had no effect upon the wife's property rights or claim in interest in property held by the husband.

(p) The questions pertaining to the property rights of this widow were fully presented to the lower court and to the District Court of Appeal of Florida, Third District. The lower court, as well as the District Court of Appeal, completely ignored this property right issue and treated this case as if Mrs. Simons were still living. The issue as to whether the divorce was effective to support a claim that the parties were, in fact, divorced a vinculo matrimonii by virtue of the Florida decree, is of no importance. It is only the effect or claimed effect of

that decree based upon substituted service which is important.

(q) The question, therefore, is very clear, that a husband living in New York City, whose property and person are in New York at the time of his death, can circumvent the rights of his wife by simply declaring himself in a prior will to be a resident of Florida, and appointing a Florida bank as the executor of his estate.

(r) If such a proceeding can be used to circumvent the rights of the widow, then truly all full faith and credit of foreign decrees has been ignored by the appellate decision.

(s) The primary conflict which is simply raised from the face of the opinion, clearly shows that this opinion, if permitted to stand, is not only directly in conflict with the Florida decisions above mentioned, but purports to give the right to a husband to completely violate the laws of the state in which the parties had their matrimonial domicile, and to defeat the rights of the wife. We have here a case where Lucy C. Simons in the State of New York is the legal widow of Sol Simons, deceased. Can she be defrauded of her rights as his widow by the process used herein? According to the opinion under attack she can be, simply by service by publication, without any finding or determination by the Florida Court, that Sol Simons was actually a bona fide resident of Florida so as to give the Florida Court jurisdiction. If this case were permitted to stand, it would be a shocking situation, and one not at all consistent with the actual and specific cases and decisions of the Supreme Court of Florida, but it is dead contrary to the concepts of the federal doctrines which have been in force and effect since the famous decision of *Pennoyer* v. *Neff*, 95 U.S.

714, 24 L. Ed. 565; *Rice* v. *Rice*, 336 U.S. 674, 69 Sup. Ct. 751, 93 L. Ed. 957; *Armstrong* v. *Armstrong*, 350 U.S. 568, 76 Sup. Ct. 629, 349 U.S. 915; *Williams* v. *State of North Carolina*, 317 U.S. 287, 63 Sup. Ct. 207, 87 L. Ed. 279.

(t) These matters have not been covered by the opinion of the District Court of Appeal, Third District, but are pertinent and controlling. However, there is no question but that Lucy C. Simons did know about the Florida proceeding, and that she did not come into the State of Florida to oppose that proceeding. If this Court sees fit to uphold that doctrine, although in conflict with this Court's decisions in other cases, then further briefing or further records in this case before this Court would not be of any assistance. If, on the other hand, this Court will not adhere to that broad doctrine, then we respectfully petition the Court to permit oral argument, and to permit us to present detailed briefs with reference to the other phases of the case just as they were presented before the lower court and before the District Court of Appeal of Florida, Third District.

Respectfully submitted,

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1240 duPont Building
Miami, Florida

MONTAGUE ROSENBERG
407 Lincoln Road
Miami Beach, Fla.

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420 Lincoln Road
Miami Beach, Fla.

By .....
W. G. WARD, of Counsel
Attorneys for Petitioner, Lucy C. Simons

I hereby certify that copy of the foregoing petition for writ of certiorari was this 21st day of January, 1964, mailed to counsel for the respondent, Messrs. Sibley, Grusmark, Giblin, King & Levenson, 605 Lincoln Road, Miami Beach, Florida.

.....

W. G. WARD

APPENDIX E

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1964

WEDNESDAY, MAY 13, 1964

LUCY C. SIMONS, a widow,
Petitioner,
vs.
MIAMI BEACH FIRST NATIONAL BANK, etc.,
Respondent.

Case No. 33,206

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal, Third District of Florida, in said cause bearing date October 29, 1963, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied

A True Copy

TEST:

/s/ Guyte P. McCord
Guyte P. McCord
Clerk Supreme Court

STATE OF FLORIDA)
)
COUNTY OF DADE)

I, WILLIAM P. CARTER, Clerk of the District Court of Appeal of Florida, Third District, DO HEREBY CERTIFY that the above and foregoing order is a true and correct copy of a true copy of the order of the Supreme Court of Florida denying a petition for writ of certiorari to this court as certified to me by Guyte P. McCord, Clerk of the Supreme Court of Florida, in the case of LUCY C. SIMONS, a widow, Appellant, vs. MIAMI BEACH FIRST NATIONAL BANK, as Executor of the Estate of SOL SIMONS, Deceased, Appellee, CASE No. 63-201.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Court this 22nd day of July, A.D. 1964.

/s/ William P. Carter

(Seal)

Clerk District Court of Appeal of Florida, Third District

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Supreme Court, U.S.
FILED
AUG 26 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 363

LUCY C. SIMONS,
Petitioner,

vs.

MIAMI BEACH FIRST NATIONAL BANK,
as Executor of the Estate of
SOL SIMONS, Deceased,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1964

No. 363

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vs.

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as Executor of the Estate of
SCL SIMONS, Deceased,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case arises out of the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County. The petitioner was the plaintiff in the trial court and the appellant in the District Court of Appeal, in and for the Third District of Florida, and petitioner seeking a discretionary writ of certiorari from the Florida Supreme Court. Respondent was defendant, appellee, respondent respectively

below. The parties shall be referred to by their appropriate designations in this Court.

Pursuant to United States Supreme Court Rule 21, the petitioner elected to file a single copy of the transcript of record with the Clerk of this Court and not serve a copy of that record upon respondent. Petitioner notified the respondent that she forwarded to this Court "one printed copy of *the record* recently pending in the District Court of Appeal of Florida, Third District, in Case No. 63-201", which respondent takes to mean that the entire record on appeal has been presented to this Court. The following symbols shall be employed:

"TR" for Transcript of Record.
"PX" for Plaintiff's Exhibit.
"DX" for Defendant's Exhibit.

Respondent is constrained to restate the case and facts since petitioner's presentation is riddled with inaccuracies and statements that are unsupported by the record.

The petitioner, in 1946, instituted separate maintenance proceedings in New York. In 1947, the New York court awarded her a separate maintenance decree allowing her support money. In November, 1951, Sol Simons became a domiciliary of the state of Florida. On November 17, 1951, he executed a lease for an apartment at 1110 Venetian Way, Miami, Dade County, Florida, and, thereafter, executed eight (8) successive leases covering the years 1951 through 1959, with the last expiration date on November 30, 1960, a month after his death in October, 1960. All nine (9) leases were admitted into evidence as DX B. Sol Simons declaration of domicile and citizenship, which was filed among the public records of Dade County, Florida, expressly stated that he became a permanent resi-

dent of Dade County, Florida, in November, 1951, and was admitted into evidence as DX A. Sol Simons formed a Florida corporation known as Fruit Sales, Inc., on November 19, 1951. Composite exhibit DX H containing the original corporate charter and annual corporate reports, filed with the Secretary of State for the State of Florida for the period 1951 through 1960, reflect that Sol Simons was the president and a director of that corporation, residing at 1110 Venetian Way, Miami, Dade County, Florida. Mr. Simons' accountant, Sidney Wasserman, testified that Sol Simons became his client in November, 1951, and was advised by him what Mr. Simons had to do as a Florida resident with respect to the field of accountancy. Mr. Wasserman testified that Sol Simons filed his 1952 estimated federal income tax return in Florida and all subsequent tax returns here (Tr. 786-87). Those income tax returns for the years 1952 through 1960 were admitted into evidence as DX J. Subsequent to the death of Sol Simons, his last will and testament was offered for probate in the County Judges' Court, in and for Dade County, Florida, and letters testamentary were issued naming respondent as executor of the Estate of Sol Simons, deceased. The petitioner filed an election to take dower in the Sol Simons Estate pending in the County Judges' Court, in and for Dade County, Florida, and expressly stated under oath that Sol Simons "died while a resident of Dade County, Florida". A certified copy of that election to take dower was admitted into evidence in this case as DX R.

Sol Simons, on March 11, 1952, after having been a domiciliary of the State of Florida for a period in excess of ninety (90) days (as required by the then applicable statutes of the State of Florida) instituted suit for divorce against the petitioner. In strict compliance with the constructive service statutes of Florida, the defendant, in the

original divorce proceeding was served constructively with process. The petitioner admits that she received the notice of publication and bill of complaint in the original divorce proceeding. The transcript is peppered with that admission typical of which is the following (Tr. 682):

> "Well, I got notice that he had advertised in a Jewish newspaper in Miami that he was suing me for divorce and I was so startled."

The petitioner candidly admitted at the trial in this cause that she based her decision to ignore the Florida divorce proceedings upon advice of New York counsel. Her testimony in that regard reads as follows (Tr. 698-99):

> "Q. Who is Mr. Allan, an attorney you consulted about this notice immediately after you received it?
>
> A. Oh, yes. I called him. I'm sorry.
>
> He said there is no validity to that. He said, 'Pay no attention to it.'
>
> Q. Mr. Allan told you after you received the notice that you were being sued for divorce, that it had no validity in New York?
>
> A. Yes, sir.
>
> Q. And told you to pay no attention to it?
>
> A. Yes, sir.
>
> Q. He also told you, did he not, that New York did not recognize Florida divorces?
>
> A. Well, I had no divorce at the time.
>
> Q. That is what Mr. Allan told you, did he not?
>
> A. Yes.
>
> Q. So, after Mr. Allan told you to ignore it, that it meant nothing, New York did not recognize Florida divorces, you put it away and forgot about it?
>
> A. That's right."

The entire record of the original divorce proceeding was admitted into evidence in this case as PX 3. The chancellor

in the original divorce proceedings appointed a special master to take testimony and report his findings of fact and conclusions of law to the court. Those findings and conclusions read as follows:

"Findings of Fact and Conclusions of Law.

1. The Bill of Complaint is legally sufficient and states a cause of action.

2. The plaintiff has, by competent and corroborated evidence, established that he is a bona fide resident of the State of Florida, and has been such resident for more than ninety (90) days prior to the 11th day of March, 1952 (tt. 2, 3, 4, and 6).

3. The plaintiff has proved by his corroborated testimony the grounds for divorce alleged in his Bill of Complaint (tt. 6, 7, 8, 9, 10, and 11).

4. There were no children born as a result of this marriage.

5. There are no property rights to be adjudicated herein."

On April 30, 1952, a final decree of divorce was rendered by the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, which ratified and confirmed the special master's report in every particular and dissolved the bonds of matrimony between the petitioner, Lucy Simons, and the now deceased, Sol Simons.

Ten (10) years later, on February 23, 1962, after Sol Simmons had died, the petitioner filed in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, an original bill in the nature of a bill of review seeking to annul and vacate the final decree of divorce which had been rendered on April 30, 1952. Her attack in the court of rendition upon the final decree of divorce was based on the following four (4) alleged grounds:

1. That Sol Simons in the original divorce proceeding concealed the fact that a New York separate maintenance decree had been previously granted to her;

2. That Sol Simons falsely and fraudulently claimed to be a bona fide resident of Dade County, Florida, for 90 days preceding the institution of the divorce suit;

3. That the final decree of divorce showed lack of jurisdiction on its face because it mistakenly recited that defendant had filed an answer; and

4. That after she received notice of the pending Florida divorce proceeding her husband lulled her into inaction.

The trial court's findings of fact in this cause, upon which a final decree of dismissal was entered, were as follows:

(1) "In my opinion, the evidence is wholly and totally insufficient to destroy the presumption of correctness of the divorce decree. I think the burden is upon the person who attacks it, and I think the evidence falls remarkably short of it." (TR. 846).

(2) "I discount completely and entirely the statement that Mrs. Simons made as to the friendly relationship between her and her husband, because of the letter she wrote him saying that there is no reason why he should hate her like he does. That is in Defendant's Exhibit P." (Tr. 846).

(3) "The exact date has not been stated but she stated she had this conversation over the telephone with Mr. Simons about the pendency of the divorce suit, and the next day she and her sister went out to see him."

"The Clerk's certificate showed that the notice was mailed from the Clerk's office on the 14th day of March. Presumably, she would not have received it before the 16th, and more likely the 17th, depending upon the day of the week, and there is testimony that the man was here dictating to two people at that time." (TR. 846-7).

(4) "On this, she was lulled into a false sense of security.

Her testimony does not gibe with the facts, because she has not said when it was. But she said it was a day or two after she got it.

They were dealing at arm's length. He was angry with her, because she had brought these proceedings to increase the alimony, and she had to have it done legally. But she had nothing done legally about stopping the divorce here.

After she talked to him, she went to a man who said that the Florida divorce was no good. The attorney may have given her a false sense of security.

From the evidence here, I do not think Mr. Simons did, and I discount her testimony as to their conversation. I do not think it is true." (Tr. 848).

On appeal, the dismissal of the attack upon the ten (10) year old divorce decree was affirmed. Regarding the first two (2) stated grounds of attack upon the divorce decree, the District Court of Appeal, in and for the Third District of Florida, held that, under settled precedent in Florida, those issues were such that they could and should have been litigated in the original divorce suit. Similarly, that any affirmative defenses that petitioner had should have been asserted in the divorce suit, and that the prior New York separate maintenance decree was not a bar to a

divorce suit, and the husband's failure to disclose its existence in the complaint was not a fraud on the court. The decision of the District Court of Appeal, sought to be reviewed in this proceeding, on these points, reads as follows (Petitioner's Appendix 2-3):

> "By choosing not to appear in the Florida divorce suit the non-resident wife was precluded from filing suit years later to set aside the decree for matters which could have been litigated by her in defense of the divorce suit. She had due notice and opportunity to contest the husband's allegations as to his jurisdictional residence and his asserted ground of divorce. If she had defenses to those matters it was her duty to assert them in the divorce suit, and the chancellor was eminently correct in holding she was not entitled to maintain the present suit to set aside the decree for those reasons. Mabson v. Mabson, 104 Fla. 162, 140 So. 801; Bernstein v. Bernstein, 160 Fla. 579, 36 So.2d 190; MacFadden v. Muckerman, Fla. App. 1959, 116 So.2d 448.
>
> The prior New York separate maintenance decree was not a bar to a divorce suit by the husband, and his failure to disclose it in his complaint was not a fraud on the court. Matsis v. Matsis, 155 Fla. 786, 21 So.2d 545; Bernstein v. Bernstein, supra. Any affirmative defense the prior suit may have afforded should have been presented in the divorce suit. See Prall v. Prall, 58 Fla. 496, 50 So. 867, 26 L.R.A., N.S., 577; Bernstein v. Bernstein, supra; Gordon v. Gordon, Fla. 1952, 59 So.2d 40; Stone v. Stone, Fla. App. 1959, 111 So.2d 486; Taylor v. Taylor, Fla. App. 1961, 130 So.2d 115."

Regarding the third prong of the attack upon the ten (10) year old divorce decree, namely, that it displayed want of jurisdiction on its face because it incorrectly recited that the defendant answered, the District Court of Appeal succinctly pointed out, as it had been proven in the trial court,

that there was no mistake by the original chancellor in the divorce proceeding since the decree adopted and ratified the master's report which did contain a finding in favor of jurisdiction and recited the details in the body of that report establishing the prerequisite jurisdictional facts plus strict compliance with the constructive service of process statutes. The holding of the District Court of Appeal on this point reads thusly (Petitioner's Appendix 3):

> "The basis for the contention that the decree showed want of jurisdiction on its face was because it incorrectly recited the defendant had answered. But the record indicates the chancellor was under no misapprehension as to nature and status of the case before him on final hearing. This is so because the master's report, which the court confirmed, showed the true situation in detail."

Pertaining to the last ground upon which the petitioner attacked the divorce decree, namely, that after she personally received notice of suit by publication, her husband lulled her into inaction. The District Court of Appeal held that the chancellor decided that issue on conflicting testimony and that the ruling was adequately supported by the evidence. The District Court of Appeal's holding on that point reads as follows (Petitioner's Appendix 3-4):

> "The appellant's claim that the husband, in 1952 after she had notice of his divorce suit, lulled her into inaction, was properly denied by the chancellor, for her delay (Barnes v. Willis, 65 Fla. 363, 61 So. 828), and on the merits. That issue was tried before the chancellor in the instant case, in the course of which it was required that he judge the credibility of witnesses and resolve conflicts in the evidence, and his ruling thereon is adequately supported by the record."

Conspicuously absent in the petition filed in this cause is any attempted compliance with United States Supreme

Court Rule 23 1(f). Petitioner has strategically avoided compliance with that rule because she cannot demonstrate that the now alleged federal question was timely and properly raised so as to give this Court jurisdiction to review the decision of the District Court of Appeal, in and for the Third District of Florida. No federal question, much less the one now asserted, was raised in either the Florida trial court or the Florida appellate court. This case was, as the above quoted recitations from the opinion sought to be reviewed demonstrate, decided strictly on state issues.

ISSUE

Whether or Not a New York Separate Maintenance Decree Precludes a Florida Divorce Decree Based on Constructive Service of Process That in No Way Alters or Affects Such Prior New York Decree?

ARGUMENT

A New York Separate Maintenance Decree Does Not Preclude a Florida Divorce Decree Based on Constructive Service of Process Which in No Way Alters or Affects Such Prior New York Decree.

This case is an attack upon a ten (10) year old divorce decree in the state of rendition. It in no way involves the questions that were involved in the two *Williams* cases (*Williams* v. *State of North Carolina*, 317 U.S. 287, 63 S. Ct. 207, and 325 U.S. 226, 65 S. Ct. 1092). The question is entirely one of state law. The decision of the District Court of Appeal, in and for the Third District of Florida, sought to be reviewed is based on long settled precedent in the State of Florida. It is a basic and permanent part of the jurisprudential panorama of Florida that spouses

served constructively with process in divorce litigation may not ignore that process with impunity and wait until after a final decree of divorce becomes absolute and passes into repose by the lapse of time allowed for the taking of appeals to litigate issues which could have been raised in the original proceeding. This is simply another way of saying that a final decree may not be challenged for intrinsic factors after the time for the taking of an appeal has expired. The decision of the District Court of Appeal sought to be reviewed is based on the Florida Supreme Court's decisions in *Mabson* v. *Mabson*, 104 Fla. 162, 140 So. 801; *Matsis* v. *Matsis*, 155 Fla. 786, 21 So.2d 545; *Bernstein* v. *Berstein*, 160 Fla. 654, 36 So.2d 190; and many others which need not be treated. In the *Mabson* case, *supra*, the Supreme Court of Florida was faced with a divorce suit instituted by a husband in which the wife was served constructively. The wife left the husband to take up residence in New York. She admitted (as the petitioner admits here) that she received notice of suit but contended it was procedurally defective. The wife failed to exhibit her original bill in the nature of a bill of review raising the objection until seven (7) years after the decree had been rendered. In the meantime, she litigated in New York, based on personal service on the husband, the question of support money. It appears that when the wife received the notice of the Florida divorce proceeding, she discussed it with her New York lawyer and, apparently, decided to ignore the Florida proceeding. In the instant case, that is exactly what the petitioner did and the chancellor found that she was lulled into inaction by her New York attorney and not her former husband. The rule enunciated in the *Mabson* case is best expressed in the language adopted by the Florida Supreme Court in its syllabus under headnote 6 at 140 So. 801, which reads thusly:

> "6. Where the defendant is actually served with process which may be defective in form, or subject to the objections that may be waived by the defendant, the defendant can not with impunity ignore the actual service of the kind of notice which he has received, but must ordinarily submit his objections in this regard to the court from which the process issued, in order to take advantage of them."

Mabson stands for the proposition in Florida that an original bill in the nature of a bill of review will not lie to test procedural defects where notice is received and ignored. Moreover, *Mabson* establishes that notice plus intentional disregard of pending proceedings constitutes an estoppel against a bill in the nature of a bill of review to vacate a final decree of divorce. That rule was stated in these words (140 So. at 805-806):

> "Without adjudicating the legal effect of the publication as made of the process in the divorce suit against the complainant in this cause, she should not be permitted to maintain this suit because of her conduct. It appears from the complainant's bill in the nature of a bill of review that she received from the clerk of the court, under the statute, notice of the pendency of the divorce suit against her and had reasonable opportunity to present therein her defenses and claims for alimony, but intentionally refrained from asserting her rights in the Florida court and proceeded with her suit in the courts of New York, which courts held that her claims should have been presented to the courts of Florida. Under such circumstances, equity will not entertain a bill in the nature of a bill of review brought by the complainant to challenge the validity of a decree entered by the Florida court in a divorce suit against the complainant, of which she had notice and an opportunity to be heard, but intentionally omitted to assert her claims as to matters now sought to be presented for adjudication."

In *Matsis* v. *Matsis, supra,* the Supreme Court of Florida held that a wife who intentionally refrained from contesting a divorce suit in Florida, after having received notice, could not maintain an original bill in the nature of a bill of review to set aside the final decree of divorce nine (9) months after its rendition on the ground that the husband committed fraud by concealing and not alleging prior unsuccessful divorce proceedings in New Hampshire or on the ground that the evidence of the grounds for divorce was insufficient and uncorroborated. The significance of the *Matsis* case is twofold: (1) It establishes that neither failure by a husband to allege prior unsuccessful marital litigation nor insufficiency of proof to establish grounds for divorce are appropriate grounds for an original bill in the nature of a bill of review to set aside a final decree of divorce; and, (2) That a wife who has received notice of the proceeding but refrains from contesting is estopped to assail the final decree after the expiration of the appeal period. The pertinent language of the Florida Supreme Court's holding in the *Matsis* case reads as follows (21 So.2d at 546):

> "It is our view that there is no equity in the bill, and that the motion to dismiss should have been granted. The allegations of the bill of complaint show not fraud but an attempt by the wife to relitigate issues which should have been presented in the original suit and which have been foreclosed by the entry of the final decree and the lapse of the statutory time within which to take an appeal. If the decree entered in the New Hampshire court did in fact constitute a bar to any subsequent suit by the husband on the same issues, it was Mrs. Matsis' duty to assert such defense in the original suit in timely manner, if she cared to avail herself of such defense. See Harrison v. Harrison, 19 Ala. 499. If the evidence offered by Mr. Matsis to sustain his bill was insufficient, the place to have made

> the objection was in the original suit; there being at least some evidence offered by the plaintiff in the original suit to prove his cause of action. Having intentionally refrained from asserting her defenses or contesting the issues in a suit in which she had due and legal notice and an opportunity to be heard, Mrs. Matsis may not now be heard to question the final decree in this collateral proceeding instituted after the time for appeal has expired. —citations omitted—"

It will be observed that the Florida Supreme Court made particular note of the fact that the prior marital litigation in New Hampshire was defensive and should have been alleged and proven by the wife in the original proceeding. To the same effect is the case of *Bernstein* v. *Bernstein, supra.* In *Bernstein,* the Florida Supreme Court stated (36 So.2d at 191):

> "The suit for support and maintenance is not a bar to a suit for divorce. —citation omitted— It may be expedient in a bill for divorce to recite the fact of proceedings in a foreign court for support and maintenance if they are in esse, but that is not essential to the sufficiency of the bill for divorce. Such proceedings are matters of defense and the chancellor is at liberty to deal with them as the circumstances may seem meet, since he has acquired jurisdiction of the plaintiff."

It was upon these authorities and others that the District Court of Appeal, in and for the Third District of Florida, based its holding that the petitioner did not have grounds upon which to predicate her original bill in the nature of a bill of review assailing the bona fides of residence and the nondisclosure of the prior marital litigation in New York. She (the petitioner), after having received notice of the Florida divorce litigation elected to ignore that proceeding on the advice of her New York lawyer.

She could well have litigated at that time in that original proceeding both the bona fides of residence and the effect, if any, of the New York separate maintenance decree as a bar to the cause of action for divorce. Res judicata is one of many defenses which must be affirmatively pled under settled Florida practice. (Rule 1.8 (d) of the Florida Rules of Civil Procedure) Petitioner waited for ten (10) years and the death of the original plaintiff to make her claim in the court of rendition. What the petitioner, in fact, objects to does not involve a federal question regarding the operation and effect of the full faith and credit clause of the United States Constitution, but the substantive and procedural law of Florida regarding direct attack upon final decrees that have long since passed into repose. The petitioner would, apparently, like litigation to be never ending. There is no conceivable constitutional objection to a state establishing substantive and procedural rules of law which give finality to judgments and decrees in the court of rendition. This is not a *Williams* I and II type case where the courts of a sister state, under the full faith and credit clause of the United States Constitution, may make inquiry into the foundations for jurisdiction of the court of rendition. This case represents concern and dissatisfaction by the petitioner with the settled law of the state of rendition regarding direct attack upon ancient decrees.

Petitioner has taken the untenable position that assuming the validity of the Florida divorce decree, she is, nevertheless, entitled to dower in her deceased husband's estate because she received alimony payments up to the time of his death pursuant to a New York separation decree. Petitioner cites, as authority, the recent decision of *Durfee* v. *Duke*, 275 U.S. 106, 84 S. Ct. 242. That case has no bearing on the case at bar. In that case, this Court simply held

that a plea of res judicata, based on the fact that a Nebraska court adjudicated, between the same parties, the identical issues presented in the Missouri proceeding, required the District Court in Missouri to grant full faith and credit to the Nebraska determination. In this case, the petitioner, with notice of the Florida divorce proceeding in 1952, failed to appear and assert the alleged affirmative defense that the New York separation decree was res judicata to the cause of action for divorce. Actually, it is settled, even under the authorities cited by the petitioner, that the courts of one state may properly grant a divorce based on constructive service of process and sever the marital status of the parties either before or after the courts of another state have adjudicated the wife's right to alimony and support based on personal service of process. *Estin* v. *Estin,* 334 U.S. 545, 68 S. Ct. 1213; *Armstrong* v. *Armstrong,* 350 U.S. 568, 76 S. Ct. 629; and *Pawley* v. *Pawley,* (Fla., 1950) 46 So.2d 464. Each of the cited cases recognize what is commonly known as the divisible divorce concept which embodies the above-stated principle. Petitioner, somehow, has confused and distorted the divisible divorce theory by refusing to recognize that dower flows as an incident of the marital status. Inchoate dower is born in marriage and dies in divorce. For dower to become consummate, a husband must die married. The interposition of divorce between marriage and death terminates dower. The fallacy in plaintiff's argument is that an adjudication of a wife's right to alimony and the payment of alimony of necessity requires the continued relationship of husband and wife. In fact, most frequently in divorce litigation, the final decree severs the bonds of matrimony, terminates all of the incidents of the relationship of husband and wife, including that of dower; but, specifically, provides for the continued support of the wife in the form of alimony payable by the former husband until the death of either of the parties or

the earlier remarriage of the wife. The so called divisible divorce concept merely allows the courts of one state, based on personal service of process, to adjudicate a wife's right to alimony either before or after the courts of another state have adjudicated the issue of divorce and discontinued thereby the status of husband and wife, based only on constructive service of process. The right to continue to receive alimony payments is, of course, in no wise dependent upon the continued relationship of husband and wife and can not be affected by a divorce decree based on constructive service of process. These are the legal principles which governed and controlled the relationship between Sol Simons and the petitioner up to the time of his death. The petitioner had a New York separation decree based on personal service, and the Florida divorce decree severed the relationship of husband and wife based on constructive service of process.

That divorce terminates dower is a principle of universal recognition. Exemplary of that recognition in Florida is the following:

> "A final decree of divorce puts an end to a wife's right of dower and is a complete defense to any claim for dower at the death of the husband. This is true regardless of which spouse secures the divorce. This rule rests on the evident fact that when the marriage relation is terminated by divorce, the woman ceases to be the wife of the man and on his death does not become his widow." 11 Fla. Jur., *Dower*, Section 15, at p. 46.

The precise question of Florida law presented by petitioner that dower is not cut off by a divorce decree, based on constructive service of process, was totally rejected by the Supreme Court of Florida in *North* v. *Ringling*, 149 Fla. 739, 7 So.2d 476. The divorce decree involved in that case

was founded on constructive service of process. (See *Ringling* v. *Ringling*, 117 Fla. 423, 158 So. 125) After the husband's death, the wife sought to set aside the final decree of divorce by the vehicle of a bill in the nature of a bill of review in order to clear the way for a dower claim against the dead husband's estate. That is exactly what petitioner sought to do in this case. The pertinent language of the Florida Supreme Court's decision that dower had been terminated by the decree of divorce based on constructive service of process reads as follows (7 So.2d at 481):

> "In the absence of statute saving it, a final decree of divorce puts an end to the wife's right of dower and is a complete defense to any claim for dower at the death of the husband. This is true regardless of which spouse secures the divorce. In the case at bar, no claim for dower was asserted at the time of the final decree of divorce, nor was it ever mentioned until after the death of John Ringling. It is now attempted to be reached by bill in the nature of a bill of review."

There is no merit whatever to the petitioner's contention that divorce in Florida does not end dower.

CONCLUSION

The respondent submits that a writ of certiorari should not be granted in this cause for the following reasons:

1. The petitioner's brief is riddled with inaccuracies, which, under United States Supreme Court Rule 23 (4), is sufficient reason for denying the petition.

2. The petitioner has failed to specify in her petition the manner in which or the stage of the proceedings in either the court of first instance or the appellate court at

which the alleged federal question was raised. The reason petitioner failed to comply with United States Supreme Court Rule 23 1(f) is that the alleged federal question was not raised in the court of first instance and was only interjected in a vague and flimsy manner on petition for rehearing in the District Court of Appeal, in and for the Third District of Florida. Consequently, the federal question, if any exists, was neither timely nor properly raised; thus depriving this court of jurisdiction.

3. There is no federal question involved. The only legal issues involved in this litigation concern the substantive and procedural laws of the State of Florida, as the Court of rendition, pertaining to direct attacks upon final decrees in chancery which have passed into repose.

4. That there are no special and important reasons for the issuance of a writ of grace in this cause as contemplated by United States Supreme Court Rule. 19. The record demonstrates that the inter-relation of the 1946 New York separate maintenance decree and the 1952 Florida divorce decree operated and functioned in strict compliance with the past decisions of this Court in the cases of *Estin* v. *Estin, supra,* and *Armstrong* v. *Armstrong, supra.*

Wherefore, the respondent respectfully requests that certiorari be denied.

Respectfully submitted,

MARION E. SIBLEY
Attorney for Respondent
605 Lincoln Road
Miami Beach, Florida 33139

CERTIFICATE OF SERVICE

The Undersigned Certifies that three (3) true and correct copies of the above and foregoing Brief In Opposition To Petition For Writ Of Certiorari were furnished by mail, by depositing same in a United States mailbox with first class postage prepaid, addressed to counsel of record for the petitioner, William Gresham Ward, 1240 duPont Building, Miami, Florida 33131, on this 21 day of August, 1964.

.....

MARION E. SIBLEY.

APPENDIX

APPENDIX

THIS RECORD COMPLETED AND FILED IN THE CLERK'S OFFICE THIS MAY 9th, 1963 TO BE RETAINED HERE FOR THE USE OF ATTORNEYS UNTIL THE TIME WHEN SAME WILL BE TRANSMITTED TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT.

E. B. Leatherman,
Clerk Circuit Court
By R. M. Williams

ORIGINAL RECORD

OF THE PROCEEDINGS IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA.

IN CHANCERY,

NO. 62C 1980

IN THE CASE OF
LUCY C. SIMONS, a widow,
Plaintiff,

-vs-

MIAMI BEACH FIRST NATIONAL BANK, a banking institution organized and existing under the laws of the United States, with its principal place of business in the City of Miami Beach, Dade County, Florida, as Executor of the Estate of SOL SIMONS, deceased.
Defendant.

THEREIN LATELY PENDING.

INDEX TO TRANSCRIPT

Date of Filing	Kind of Instrument	Pages
Feb. 23, 1962	Complaint together with Certain Instruments, attached thereto:	1-22
	EXHIBIT I: Copy of Petition Relative to Claim of Dower, in the Judge's Court, Dade County, Florida, Probate No. 51039-B	(Pg. 12-13)
	EXHIBIT 1: Copy of Motion to Dismiss Cause from District Court Southern District of Florida Miami Division, case No. 11,082-M-CIVIL	(Pg. 14)
	EXHIBIT 2: Final Decree in Chancery Case No. 148091-E	(Pg. 15)
	EXHIBIT 3: Decision of the SUPREME COURT, NEW YORK COUNTY, Special Term, Part IV, November 25, 1946 before Mr. Justice James B. M. McNalley (copy)	(Pgs. 16-22)

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Mar. 2, 1962	Summons issued together with original return of service on Miami Beach First National Bank	23
Mar. 16, 1962	Motion to Dismiss	24
Mar. 16, 1962	Motion for Summary Final Decree, together with Certified copy of Election to Take Dower, in the County Judges' Court, Dade County, Florida, In Probate No. 51039-B, attached thereto	25- 27
Mar. 16, 1962	Notice of Hearing (Special Appointment)	28- 29
Mar. 23, 1962	Affidavit (Lucy C. Simons)	30- 31
Apr. 10, 1962	Order Dismissing Motion of Defendant to Dismiss Complaint	32
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Apr. 20, 1962	Notice of Taking Deposition	34- 35
Apr. 20, 1962	Notice to Post Non-Resident Bond	36- 37
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Apr. 30, 1962	Answer	41- 46
Apr. 30, 1962	Notice of Hearing (Motion Calendar)	47- 48
May 1, 1962	Letter dated April 30, 1962 from Montague Rosenberg to E. B. Leatherman, together with attached Receipt No. 9742 dated May 1, 1962 for check on Cost Bond from E. B. Leatherman, in the sum of $100.00	49- 50
May 4, 1962	Protective Order	51

Date of Filing	Kind of Instrument	Pages
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	Deposition of Lucy C. Simons	53- 97
May 31, 1962	Notice of Taking Deposition De Bene Esse of Arthur Meyers	98
June 5, 1962	Motion for Protective Order, together with copies of letters from Irving B. Levenson to Ward & Ward, dated May 3, 1962, and from Ward & Ward to Irving B. Levenson, dated May 17, 1962, attached thereto	99-103
June 5, 1962	Notice of Hearing (Motion Calendar)	104-105
June 8, 1962	Protective Order	106
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June 28, 1962	Notice of Hearing (Motion Calendar)	109-110
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July 9, 1962	Request for Admissions	115-116
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July 12, 1962	Objection of Plaintiff to Request for Admissions	119-120
Aug. 15, 1962	Notice of Filing Deposition	121
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Oct. 12, 1962	Witness Subpoenas issued together original returns of service on	
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Jan. 30, 1963	Memorandum in Support of Complaint and Testimony	176-201
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Feb. 18, 1963	Notice of Hearing (Special Appointment)	206-207
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Mar. 18, 1963	Cost Decree	210-211
Apr. 5, 1963	Satisfaction of Cost Decree	212
Apr. 5, 1963	Designation to Reporter	213-214
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	Deposition of William H. Weber, de bene esse, together with Notice of Taking Deposition De Bene Esse, and Protective Order (copies), attached thereto	216-282

Date of Filing	Kind of Instrument	Pages
	Arthur Joseph Meyers, de bene esse	283-354
	Helen Forman	355-419
Aug. 6, 1962	Envelope to Depositions	420
	Deposition of Myron J. Green and Envelope attached thereto	421-442
	Deposition of Jerome Mayer and Envelope attached thereto	443-459
	Deposition of Sadie Miner and Envelope attached thereto	460-479
	Deposition of Edgar A. Mandeville and Envelope attached thereto	480-492
Apr. 15, 1963	Transcript of Testimony	493-850

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Seymour B. Liebman	752	771		
Sidney Wasserman	784	795	805	
Sylvia Sherman	806	811	817	
Dorothy Newhoff Cohen	818	823		
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	Certified copies of the following instruments transmitted to District Court are numbered to coincide with the originals.	
Mar. 26, 1963	Notice of Appeal	851

Jan. 30, 1963	Final Decree	852-853
Apr. 5, 1963	Assignments of Error	854-856
Apr. 5, 1963	Directions to the Clerk	857-858
Apr. 9, 1963	Cross Direction to the Clerk	859

STATE OF FLORIDA)
)
COUNTY OF DADE)

I, E. B. LEATHERMAN, Clerk of the Circuit Court for the County of Dade, State of Florida, DO HEREBY CERTIFY that the foregoing Pages 1 to 859, inclusive, comprising Volumes I through VI, contain a correct copy of the judgment in the case of LUCY C. SIMONS, a widow, Plaintiff, against MIAMI BEACH FIRST NATIONAL BANK, a banking institution organized and existing under the laws of the United States, with its principal place of business in the City of Miami Beach, Dade County, Florida, as Executor of the Estate of SOL SIMONS, deceased, Defendant, and a true and correct recital and inclusion of all of such original papers and proceedings in said cause as appear from the records and files of my office that have been directed to be included in said record by the directions furnished me.

(Pages 493 to 850, inclusive, embrace the transcribed notes of the reporter as made at the trial and certified to me by him, and bound under separate volume.)

(Pages 851 to 859, inclusive, embrace certified copies of the appeal papers to be retained by the District Court.)

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court this 15th day of May, A. D., 1963.

E. B. Leatherman
Clerk Circuit Court

By .....
Deputy Clerk

STATE OF FLORIDA)
)
COUNTY OF DADE)

I, E. B. LEATHERMAN, Clerk of the Circuit Court in and for Dade County, Florida, DO HEREBY CERTIFY that the foregoing pages numbered 851 to 859, inclusive, contain true and correct copies of appeal papers numbered to coincide with the original papers filed in the case of LUCY C. SIMONS, a widow, Plaintiff, against MIAMI BEACH FIRST NATIONAL BANK, a banking institution organized and existing under the laws of the United States, with its principal place of business in the City of Miami Beach, Dade County, Florida, as Executor of the Estate of SOL SIMONS, deceased, Defendant, Chancery Case No. 62C 1980, being as follows, to wit:

Notice of Appeal filed March 26, 1963, and recorded March 28, 1963, in Chancery Order Book 1668, Page 321,

Final Decree filed January 30, 1963, and recorded January 31, 1963, in Chancery Order Book 1654, Page 269,

Assignments of Error filed April 5, 1963,

Directions to the Clerk filed April 5, 1963,

Cross Direction to the Clerk filed April 9, 1963,

according to the records and files of my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court this 15th day of May, A.D., 1963.

E. B. Leatherman
Clerk Circuit Court

By .....
Deputy Clerk

STATE OF FLORIDA)
)
COUNTY OF DADE)

I, E. B. LEATHERMAN, Clerk of the Circuit Court for the County of Dade, State of Florida, DO HEREBY CERTIFY that the enclosed Exhibits are the Plaintiff's and Defendant's Exhibits, being as follows, to wit:

PLAINTIFF'S EXHIBITS

1. Certificate of Judges Decision of the Supreme Court of the State of New York
2. Certificate of Hearings of the Justice of the Supreme Court of the State of New York & (Certificate of Findings)
3. Chancery Case No. 148091 in Circuit Court of Florida, Dade County
4. Copy of Transcript of Minutes of Proceedings from the Supreme Court of the State of New York, before the Hon. David L. Weil, Official Referee, Jan. 29, 52.
5. Letter dated April 3, 1952, from Millard & Greene to Sol Simons
6. Letter dated from Sol Simons to Myron J. Greene
7. Page 1490 from N.Y. City Phone Directory (Manhattan)
8. Page 1091 from N.Y. City Phone Directory (Queens)

DEFENDANT'S EXHIBITS

A. Declaration of Domicile and Citizenship, Dade County, Florida, for Sol Simons

B. Copy of Renewal Apartment Lease dated Sept. 21, 1959, between Sandpiper Villas and Sol Simons

C. Letter dated 2/4/52 from Sol to Dear Seymour

D. Letter dated 2/20/52 from Sol to Dear Seymour

E. Composite of Gasoline bills to Sol Simons

F. Certified copy of Certificate of Title Application No. 2947596, State of Florida

G. Paid Bill from Nolan Brown Motors to Sol Simons, 3-17-52

H. Certificate of Incorporation of Fruit Sales Corporation, Inc., Office of Secretary of State of Florida, and copy of Certificate of Incorporation, etc., attached thereto

I. N. Y. State Income Tax Resident Return, 1951 (copy)

J. Composite of U. S. Income Tax Returns (copies), years 1952 to 1960, inclusive for Sol Simons

K. Letter from Metropolitan Dade County, Florida, Tax Collection Div. dated July 19, 1962

L. 4 pages of photo-copies of various checks

M. Various Correspondence Files from Sol Simons, etc.

N. Letters from Dorothy Newhoff comprising 3 Pd. Bills for Sol Simons, dated March 26, 1952, Apr. 18, 1952 and May 2, 1952, respectively (Public Stenographer)

O. Various Correspondence Files from Sol Simons, etc.

P. Handwritten letter dated Nov. 20, 1957, from Lucy to Dear Sol

Q. 3 Letters from Millard & Greene to Sol Simons, dated November 19, 1951, November 26, 1951 and November 27, 1951, respectively

R. Certified copy of Election to Take Dower, from County Judges' Court, Dade County, Florida, In Probate, No. 51039-B

S. Copy of Last Will and Testament of Sol Simons

as reflected by the Judge's file stamps appearing thereon in the case of LUCY C. SIMONS, a widow, Plaintiff, against MIAMI BEACH FIRST NATIONAL BANK, a banking institution organized and existing under the laws of the United States, with its principal place of business in the City of Miami Beach, Dade County, Florida, as Executor of the Estate of SOL SIMONS, deceased, Defendant, Chancery Case No. 62C 1980, according to the records and files of my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court this 15th day of May, A.D., 1963.

E. B. Leatherman
Clerk Circuit Court
By /s/ R. M. Williams
Deputy Clerk

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 363

LUCY C. SIMONS,
Petitioner,

vs.

MIAMI BEACH FIRST NATIONAL BANK, as Executor of the Estate of SOL SIMONS, Deceased,
Respondent.

BRIEF OF PETITIONER ON THE MERITS

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SUPREME COURT OF THE UNITED STATES

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MIAMI BEACH FIRST NATIONAL BANK, as Executor of the Estate of SOL SIMONS, Deceased,
Respondent.

BRIEF OF THE PETITIONER ON THE MERITS

A petition for a writ of certiorari to the District Court of Appeal of Florida, Third District, was filed by Lucy C. Simons on August 10, 1964, and certiorari was granted by this Court by order dated October 19, 1964 (see P. Tr. 336).

(a) The opinion of the District Court of Appeal of Florida, Third District, sought to be reviewed herein, dated the 29th day of October, 1963, is officially reported at 157 Southern Reporter, Second Series, at page 199, and is shown in the printed transcript beginning on page 320.

(b) As set forth in the petition for a writ of certiorari the District Court of Appeal of Florida, Third District, entered the opinion as above stated on the 29th day of October, 1963. A petition for rehearing was filed within

the time allowed by the Florida Rules of Appellate Practice, which stayed any issuance of the mandate on the original opinion. The petition for rehearing was denied by the District Court of Appeal of Florida, Third District, on November 22nd, 1963, and the mandate was issued on the 22nd day of November, 1963 (see P. Tr. 323). A timely petition for certiorari was filed in the Supreme Court of Florida, which is a discretionary writ. This was filed on January 21, 1964, within the sixty-day period and pursuant to Article V, Section 4, of the Florida Constitution, and Rule 4.5c of the Florida Appellate Rules. On May 13, 1964 the Supreme Court of Florida denied the petition for writ of certiorari (see P. Tr. 335). This petition for certiorari was timely filed (Title 28, U.S.C., §2101). The jurisdiction of the Supreme Court of the United States is invoked under Title 28, U.S.C., §1257, as a certiorari from the final judgment or decree rendered by the highest Court of the State in which a decision can be made. The District Court of Appeal of Florida, Third District, is the highest State Court where the petitioner unsuccessfully petitioned for further discretionary review in the Supreme Court of Florida and, therefore, this petition is allowable by this Court (*Douglas* v. *People of the State of California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811).

(c) STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

(1) U.S.C.A., Title 28, §1738, 62 Stat. 947:

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Pos-

sessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947."

(2) Constitutional Provisions. United States Constitution, Article IV, Section 1:

"Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

(d) (1) QUESTIONS PRESENTED. Did the State Courts of Florida fail to give full faith and credit to a prior decree of separation duly entered in the State of New York in favor of the wife, Lucy C. Simons, in refusing to grant to Lucy C. Simons, as the widow, her widow's rights by way of dower when the estate of Sol Simons was subsequently probated in Florida because a Florida Court, some six years after the final decree of separation in New York in favor of the wife, granted a divorce decree on a suit filed by Sol Simons in Florida where the wife was served by publication, but did not appear or plead in the case in person or by counsel, where it is conclusively shown in the State Court proceedings appealed from that the Florida divorce decree in favor of the husband, ex parte, was based upon the same grounds and the same factual situation which the husband had raised and pleaded unsuccessfully in the New York Court?

The Petitioner, Lucy C. Simons, contends that under the separation decree in the Supreme Court of New York in 1946 these controverted issues were decided in her favor and she was granted a permanent separate maintenance decree which reserved her status at the time of the death of Sol Simons as his widow. When Sol Simons died on October 26, 1960, he was present in New York State, lived in an apartment where the parties had lived during their marriage and in which he, the husband, remained domiciled until the date of his death. The husband left a Will in which he claimed he was a resident of Florida, in which the Miami Beach First National Bank, Miami Beach, Florida, was named as executor and in which Will no provision was made for the wife. Lucy C. Simons, after the death of her husband and claiming to have a property right as a widow's right under the New York law, or the more or less equivalent right as the widow under the Florida law, filed her claim for dower as the legal widow of Sol Simons in the County Judges' Court of Dade County, Florida, which is the Probate Court of Florida. Under the Florida procedure objection was filed by the executor on the ground that the ex parte Florida divorce decree cancelled this property right of the New York widow. When this objection was filed in the Probate Court and under the law of Florida, Lucy C. Simons, as the widow, was relegated to her action in the Florida Courts by way of an equity action for the determination of her rights as a property right in the estate of Sol Simons, deceased. The Circuit Court of Dade County entertained this complaint (see P. Tr. 1), but dismissed the complaint (see P. Tr. 315). Upon notice of appeal the District Court of Appeal of Florida, Third District, entered its opinion (P. Tr. 320. See also official reported decision, 157 So. 2d 199). The Supreme Court of Florida refused to grant a discretionary review by certiorari.

(d) (2) It is contended on this petition for certiorari that the District Court of Appeal of Florida, Third District, failed to give full faith and credit to the decree of separate maintenance of the State of New York through the Supreme Court of New York decision of 1946. In doing so Lucy C. Simons was deprived of her property rights without due process of law, in violation of the full faith and credit clause of the United States Constitution, Article IV, §1, and the Act of Congress, U.S.C.A., Title 28, § 1738, 62 Stat. 947, pertaining to full faith and credit, and in violation also of the Fifth Amendment of the Constitution of the United States, in that she has been deprived of her property without due process of law, and also that provision of the Fourteenth Amendment, Section 1, in that portion which provides:

> "Nor shall any State deprive any person of life, liberty or property, without due process of law:"

These property rights are established by the decision of this Court in *Estin* v. *Estin*, 334 U. S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561 (see text 334 U. S. 548, 68 S. Ct., text page 1218, first column, first complete paragraph).

The essential constitutional question as raised in the petition for certiorari is the full faith and credit provisions of Article IV, § 1. The collateral reference to the Fifth and Fourteenth Amendments is submitted as a collateral proposition, because if the State of Florida is required to give full faith and credit to the New York decree of 1946, then Lucy C. Simons is the legal widow of Sol Simons, deceased, and her rights would then be adjudicated according to the state law.

(e) A CONCISE STATEMENT OF THE CASE.

Lucy C. Simons and Sol Simons were married on September 5, 1941, in New York City, and the parties lived

in a three-room apartment in Forest Hills. Up to the time the parties separated in February, 1946, Lucy C. Simons did all the clerical work in connection with her husband's business. Prior to November 25, 1946 and after February, 1946, Lucy C. Simons brought a suit in the Supreme Court of New York County under the style "Lucy C. Simons, plaintiff, vs. Sol Simons, defendant." The matter was heard before Mr. Justice James B. M. McNally, who entered a final decision of the Court on November 25, 1946. In this decision the Court set out that Lucy C. Simons had sued the defendant, Sol Simons, for a separation charging cruel and inhuman treatment. The Court found, as set forth in the original transcript at page 6, as alleged in the complaint and as shown in Exhibit 3 attached to the complaint (omitted by error in the first printing of the record in this case, but supplied by supplemental record, page 337), that the plaintiff in that case, Lucy C. Simons, had established that her husband was autocratic and despotic, egotistical and tyrannical, and his actions were such as to constitute inhuman treatment, and that in support of her complaint she had testified that on various occasions he struck her and forced her to leave by reason of his treatment; that he used vile and abusive language towards her and that he characterized her as a rat, a snake, a louse, a kike, stupid, vulgar and a guttersnipe; that he attempted to dominate her every act, and that his actions were calculated to and did cause her to become very nervous; that he struck her on a number of occasions and that he was insulting to her family. In hearing the case the Justice found on the other hand that the husband in defense stated he could give no reason for his wife's leaving him, except that she was suffering from change of life or menopause. The Court pointed out in its findings of fact:

"The question is one of fact. Practically every witness in the cause who testified was related to one of the parties, with the exception of Mary Sahanek, a woman who worked as a cleaner for the parties hereto substantially all their married life. Her testimony is to the effect that she heard arguments ten or twelve times, but she did not know the nature or the extent of the arguments."

The Court then said and found:

"The question really gets down to the question of fact between the plaintiff and the defendant. On the facts I believe that the plaintiff was a dutiful and loving wife, and that she did everything in her power to make a go of this marriage. I believe that the husband's testimony is unworthy of belief. I believe he was tyrannical, despotic; that he is a consummate actor; that he turns on tears as one would turn on Croton water.

I am not impressed with the tremor in his voice or the catch in his voice. I am not impressed with what I say is the false tear in his eye when he gave testimony.

I believe that he was cruel; that he was inhuman; that he beat his wife, who is five feet one inch and weighs 120 pounds; that he is six feet and weighs over 250 pounds; and I believe that every action on his part was calculated to and did bring about a nervous condition in his wife, and that no woman has a right to stand it.

Judgment in favor of the plaintiff on the merits.

Alimony, $500 a month."

This decree of separate maintenance entered on November 25, 1946, was continuing in one phase. On January 23, 1952 (see P. Tr. 240), at which time both Mrs. Simons and Mr. Simons were present, this hearing was con-

tinued in Room 238, New York County Court House, on an application by the wife to have her alimony increased. The record (P. Tr. 259) disclosed that Mr. Simons and his wife had prior to the separation lived at 6910 Yellowstone Boulevard, and that for six years after the separation and up to the time of this testimony on January 29, 1952 (see P. Tr. 240), he continued to live there. Reference to the printed record, page 247, as a part of the testimony taken on January 29, 1952, shows that Mr. Simons testified that a judgment of separation was entered in New York on December 4, 1946; that the original order provided for the payment of $500.00 a month and that was reduced by the Appellate Division to $400.00 a month. He testified that he had paid $400.00 a month ever since. Mr. Simons testified (see P. Tr. 241) that he was in the food brokerage business and was a selling agent for frozen fruits and fruit juices; that he had been in that business since 1942; that he had an office in his home. He said that he had been in Florida about three months. He was asked if he still maintained a residence at Forest Hills and he said that he was in the course of selling or liquidating that. He said he had bank accounts in New York City in the Sterling National Bank in Forest Hills and the National City Bank in Forest Hills and that he opened a bank account in a national bank in Miami Beach. He stated that he opened that bank account in Florida when he had to go to Florida on the doctor's orders, which was sometime in November, which was after the second proceeding for increase of the alimony had been filed and served. He stated he had safety deposit vaults or boxes (see P. Tr. 242) in the Sterling National Bank in Forest Hills. He, Mr. Simons, testified (P. Tr. 252) that his doctor told him he had to lay off for six months because of illness. He testified (P. Tr. 253) that the New York office business ceased at the end of the year, but he went away to rest.

Then counsel asked him and he answered (P. Tr. 253) that he bought new machinery and new office appliances in December. There was nothing brought up at that hearing of January 29, 1952 whereby Mr. Simons claimed that he had gone to Florida as a permanent resident or that he had discontinued his business affairs in New York as of January 29, 1952. He continued to live in the same apartment in New York and maintain his business there until he died there in New York in the fall of 1960.

In the meantime he filed a suit in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida (see P. Tr. 211) on March 11, 1952. This suit was a complaint for divorce. It was based upon service by publication. Nothing was said in the complaint about the separation proceedings in New York in 1946, or the proceedings which were still pending in the State of New York in the Supreme Court of New York in which he had just testified at length on January 29, 1952. He falsely charged (see P. Tr. 213) that on February 28, 1946 Lucy C. Simons had left the matrimonial domicile and had never resided with him as man and wife or in any capacity for the past six years, and that the desertion had been wilful, continuous and obstinate. We ask this Court to note that the decree for separate maintenance was entered on December 4, 1946 in favor of the wife, so that there could be no period of statutory desertion—wilful, continuous or obstinate—between the time of the separation on February 28, 1946 and December 4, 1946, when the final order was entered for separation alimony based upon the proceedings of November 25, 1946, above referred to.

The allegations in the complaint in Florida charged cruelty, and the only ground under the Florida law which was set forth in the complaint (P. Tr. 215) was:

"WHEREFORE, the plaintiff charges the defendant with being guilty of extreme cruelty within the meaning and purview of the laws and statutes of the State of Florida."

Nowhere in this complaint was any mention made of the final decree for separation or the fact that the parties had been living apart for approximately six years, based upon the permanent separation decree by the Supreme Court of New York. Service by publication was attempted. A decree pro confesso was entered because the defendant did not file her answer in the time prescribed by law (P. Tr. 218). The cause was referred to a Special Master in Chancery and the following testimony was submitted:

The deposition de bene esse of Sadie Fisher (P. Tr. 220), who was the aunt of Sol Simons. Her testimony did not purport to cover anything that took place after the separation, the exact date of which she did not give.

The Special Master made certain reports, findings and recommendations (see P. Tr. 225) and he recommended that the plaintiff, Sol Simons, be awarded a final decree of divorce and that no property rights were to be adjudicated.

The witness first called was Nathan Newmark, Jr. (P. Tr. 228). He testified that he had known Mr. Simons since December, 1939 and that Mr. Simons had moved to Miami Beach in mid-November, 1951. Then the witness was asked (P. Tr. 229) whether he had any conversation with Mr. Simons about whether he was going to become a permanent resident of Florida, and the witness answered:

"Well, he told me he came down here on account of his health. His doctor told him to come down. He told me it did him good."

There was no testimony that he came to Miami Beach, according to Mr. Newmark, to make it his permanent residence or that he had been in Florida continuously since November, 1951.

Mr. Albert Martin said (P. Tr. 229) that he had known Mr. Simons for some time and that he had had a conversation with him in Miami in 1951, about Thanksgiving Day, and that Mr. Simons told him he had transferred his home to Florida.

Then Sol Simons testified on his own behalf (P. Tr. 230). He testified that he had moved to Miami Beach; that he had taken out a license plate for his car; that he filed a declaration of domicile and citizenship, and then he proceeded to testify about certain relations pertaining to a claim of cruelty, but he did not mention at all that there had been a separation decree in New York in 1946 and he did not testify as to any conduct on behalf of his wife after the separation in 1946. He admitted that they were not living together (P. Tr. 235), but he made no mention of any grounds for divorce or factual matters except those which had taken place during their married life, which was terminated in February, 1946.

This completed the only testimony. A decree was entered in the Circuit Court of Dade County, Florida (P. Tr. 237), and the decree found that the defendant, Lucy C. Simons, had been guilty of extreme cruelty towards the plaintiff, Sol Simons, being the sole ground upon which Mrs. Simons had obtained a separation decree in New York in 1946, and which was still in force and effect, upon which testimony, additional testimony and additional hearings had been held in New York in January, 1952. No effort was made in this decree to fix any alimony or property rights. No facts were submitted that were not all precluded

by the prior separation decree and the judgment of the Court of New York.

The complaint filed in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, in Chancery, No. 62C 1980, is shown in the printed transcript beginning at page 1. The answer of the executor is shown on page 10. As reflected in the printed record, page 11, the executor admitted that Lucy C. Simons had filed a sworn election to take dower, but objected that the said Lucy C. Simons was entitled to dower in that Sol Simons had been validly divorced by virtue of a certain final decree of divorce in the Circuit Court of Dade County, Florida, bearing the date of April 30, 1952, entered in case No. 148091-E. The answer set forth that Lucy C. Simons had been served with process by publication and a notice through the mails to her address, Hotel Beacon, 75th Street at Broadway, New York, N. Y. Beginning in the printed transcript on page 16 there is reflected the testimony taken in this trial before the Chancellor on October 22, 1962. Page 17, as reflected in the printed transcript, shows the offer in evidence of an exemplified copy of the proceedings in the State of New York, the one in 1946 and the other starting in the fall of 1951 and ending up in April, 1952. Objection was made, but the Court overruled the objection, and these exhibits were marked Plaintiff's Exhibits 1 and 2. Exhibit No. 3 offered by the plaintiff was the entire Court file in case No. 148091, filed February 11, 1952. This was admitted as Plaintiff's Exhibit 3. All of the testimony taken in that case is then reflected in the printed transcript beginning on page 17. Certain of the depositions which had been taken were read in part, showing that Sol Simons had never left his domicile in New York on Yellowstone Boulevard and that he had lived there continuously, with the exception of busi-

ness trips, from 1946 until the date of his death in the late fall of 1960. This was the same apartment, according to the testimony, that Mr. and Mrs. Simons had occupied during the time of their marriage, until she was forced to leave in February, 1946.

The testimony of the witness, Arthur Joseph Meyers, as well as that of William H. Weber, conclusively showed that Mr. Simons continued to live in New York on Yellowstone Boulevard, with the exception that he would leave on a trip and that he never stayed over ten days as a rule. He was always going on trips to different places (see P. Tr. 72 as to Meyers' testimony). He repeated again (P. Tr. 73) that Mr. Simons was never gone more than a few weeks, even in 1952. He testified that Mr. Simons was back and forth to the apartment in New York, never being absent for more than a few weeks at any time up until the time of his death in 1960 (see general testimony, P. Tr. 85).

Mr. Jerome Mayer's testimony (P. Tr. 87) disclosed that he was an attorney practicing in New York and that he had served a subpoena upon Mr. Simons dated November 15, 1951, and that the return on the subpoena was marked "Sol Simons, 69-10 Yellowstone Boulevard, Forest Hills 1/29."

The printed transcript on page 91 shows excerpts from the deposition of Myron J. Green taken July 24, 1962. He had originally been attorney for Sol Simons in 1946. He was asked if he had had any other representation and his answer was (P. Tr. 92):

> "A. His wife at that time, Lucy C. Simons, sued him for separation in the Supreme Court of New York County.
>
> Q. What year was that, sir?

A. The action was started in 1946.

Q. Calling your attention to 1951, did Lucy C. Simons in that action institute any sort of proceedings?

A. Yes. She made an application—the answer is yes.

Q. What sort of proceeding did she institute and when?

A. She made an application to increase the amount of alimony which she was receiving under the judgment and decree in the separation action which was entered in 1947."

Then the deposition purported to show that Mr. Green had written to Mr. Simons in Miami Beach in the fall of 1951 (P. Tr. 93). In the printed transcript on page 94 it appears that Mr. Green identified certain of the portions of the transcript of the hearing on January 22, 1952 in New York. This was marked Plaintiff's Exhibit No. 4. Mr. Green testified (P. Tr. 95) that the actual order increasing the alimony was entered on March 31, 1952 by the Supreme Court Justice in New York. He was then asked (P. Tr. bottom page 95):

"Q. Now, during the course of the pendency of this litigation in New York, did you become aware of the fact that a Florida divorce proceeding had been instituted by Sol Simons against Lucy C. Simons?

A. Yes.

(P. Tr. 96) Q. How did you become aware of that fact, sir?

A. Mr. Simons told me about it."

Then he said he had talked to the attorney for Mrs. Simons, Mr. Mayer, and that he understood that Mrs. Simons expected to appear and contest the divorce action in Florida and that he had so advised Mr. Simons. This correspond-

ence was attached as Plaintiff's Exhibits 5 and 6, which letters are reflected (P. Tr. 269 and 270 respectively). Plaintiff's Exhibit 5 was the letter from Myron Green dated April 3, 1952, in which Sol Simons was advised that the New York Supreme Court had increased the alimony to a new rate of $440.00 per month on April 1, 1952. The last paragraph of the letter is significant:

> "In the light of recent telephone conversations which I had with Mr. Jerome Mayer, I am of the opinion that they will appear and contest your divorce action in Florida."

The letter from Sol Simons, which appears to be undated, was in direct answer to the letter of Mr. Green of April 3, 1952. The heading or caption at the top of the page is SOL SIMONS, Food Products, (telephone) Illinois 9-6026, (address) 69-10 Yellowstone Boulevard, Forest Hills, Long Island, N. Y. Then there is a rubber stamp impression—"Correspondence from 1110 Venetian Way Miami Beach, Fla.—Telephone 3-6330." The second paragraph of this letter is typical and demonstrates the whole singleness of purpose in Sol Simon filing the Florida suit:

> "I would appreciate your advising me the last day that an appeal can be filed against the decision rendered. I am considering appealing from the increase as I feel any payment whatsoever in this matter is a reward to perjury and miscarriage of justice, due to a temperament of a Judge whose decision was not based on facts. This has been my feeling for over 6 years, and I will never rest until I have been vindicated from a false indictment. * * *
>
> I note your opinion from your conversation with Mr. Mayer that they will appear to contest my divorce action. I would welcome such an appearance which will afford me the opportunity of presenting the facts again to prove that perjury has been committed."

Apparently Mr. Simons wanted the Florida Court to relitigate the same factual matters that Mrs. Simons and Mr. Simons had testified about in 1946 and upon which the Supreme Court of New York had rendered the opinion that Sol Simons was guilty of extreme cruelty towards his wife. It seems he expected to retry these same facts in Florida, because he had been "nursing a grudge" for six years.

The record in the Florida case, which we have above mentioned and referred to, does not reflect that in the complaint in Florida or in the testimony in Florida Mr. Simons purported to claim anything or any ground of divorce under the Florida law which had not been fully disposed of on the same charges and the same evidence in New York six years prior thereto.

The entire record in the State Court proceedings filed in 1962, after the death of Sol Simons, is copied in this record, and while it may be of interest to this Court, it was not of any interest to the State Court and the trial Judge. The Judge of the Circuit Court of Dade County, Florida did not purport to pass upon whether Sol Simons now was able to show through his executor that he had a semblance of a residential or jurisdictional basis for his suit in Florida, nor did the lower Court in Florida ever pass or purport to pass upon whether the grounds in the 1946 separate maintenance proceedings in the Supreme Court of New York, or the factual matters passed upon therein, were similar and in fact identical to the same matters which Sol Simons sought to litigate again in Florida. The Court went off solely upon the point that Mrs. Simons had not been lulled into any inaction or that Mr. Simons had not represented to her that he was going to dismiss the Florida divorce proceedings.

Page 208 of the printed transcript reflects the following statements by the Court:

"The Court: It seems to me the prime question is whether or not the divorce decree is or is not valid.

Mr. Ward: That is one phase of the case that will turn around the other cases. We can get around that very soon. But there is another phase of the case that I want to bring up today, and that is the Armstrong case that went up from Florida to the Supreme Court of the United States.

The Court: I will simplify it for you. In my opinion, the evidence is wholly and totally insufficient to destroy the presumption of correctness of the divorce decree. I think the burden is upon the person who attacks it, and I think the evidence falls remarkably short of it."

The Court then said (P. Tr. 209):

"The Court: On this, she was lulled into a false sense of security.

Her testimony does not gibe with the facts, because she has not said when it was. But she said it was a day or two after she got it.

They were dealing at arm's length. He was angry with her, because she had brought these proceedings to increase the alimony, and she had to have it done legally. But she had nothing done legally about stopping the divorce here.

After she talked to him, she went to a man who said that the Florida divorce was no good. The attorney may have given her a false sense of security."

This was followed up by the written decree of the Chancellor in the State Court (P. Tr. 315), wherein the Court in the written decree said:

"Pursuant to proper notice, this cause came on for final hearing, and after careful consideration of the pleadings and the proof, the Court having heard the

testimony and received the evidence adduced by the parties at the final hearing, and in all respects being fully advised in the premises, the Court adopts as its findings the observations made by the Court at the conclusion of the final hearing."

He thereupon dismissed the cause with prejudice.

A notice of appeal to the District Court of Appeal of Florida, Third District, was filed by Lucy C. Simons (P. Tr. 316), and assignments of error were filed on April 5, 1963 (P. Tr. 317), within the time fixed by the Rules of Florida Appellate Procedure. Without quoting each and every of the assignments of error Lucy C. Simons, through her counsel, pointed out that the lower Court erred in denying the wife's claim of dower in the Florida probate proceeding, and that the Court erred in the dismissal of the case, in refusing to hold that Lucy C. Simons was at the time of the death of her husband, Sol Simons, in New York City the wife of Sol Simons.

Assignment of error No. 3 pointed out that the Court erred in denying the claim that Lucy C. Simons was the wife of Sol Simons at the time of his death, because it failed and refused in so doing to give full faith and credit under the constitutional provisions of the United States to the fact that the status of the plaintiff and her husband was determined by the proceedings in the State of New York by way of permanent separation for alimony without divorce, and at the time and up to the time of the death of Sol Simons he lived and maintained a place of residence in the State of New York, his business was in the State of New York, he died in the State of New York and he was thereby a resident of the State of New York at the time of his death to the extent that he was bound by a separate maintenance proceeding which created the relationship of husband and wife under the laws of the

State of New York at the time of his death. These are the substantive matters claimed as a violation of the federal law which the Courts of Florida, both the trial and appellate Courts, utterly ignored.

We then pointed out on behalf of Lucy C. Simons in assignment of error No. 5 that the Florida Court erred in holding that the mere knowledge of the pendency of the divorce suit in Florida in 1952 and the receipt of a summons by mail, precluded the plaintiff from ever questioning the jurisdiction in the State of Florida of Sol Simons' claim as a citizen and resident in the state for divorce purposes, and holding that plaintiff was estopped or that the suit in Florida was res judicata to her claim for widow's rights by way of dower or otherwise.

Assignments of error Nos. 6 and 7 raised similar points, the substance of which was that the Florida Court had erred in holding that the ex parte divorce decree in the State of Florida, based upon identically the same grounds and same facts which had been previously adjudicated in the case in New York in 1946, could be utterly ignored and that the entire contractual or property rights or marital rights of Lucy C. Simons against the estate of her husband were completely wiped out and held for naught by the ex parte proceedings in Florida.

The opinion of the District Court of Appeal of Florida, Third District, is shown in the printed transcript at page 320. A study of this opinion will reflect without dispute that the District Court of Appeal of Florida, Third District, also failed to give any consideration to the full faith and credit clause of the Constitution of the United States, and failed to give any recognition to the fact that by virtue of the prior separation decree in New York in 1946 the wife had certain property rights, both during the marriage and after the death of the husband, which could not be severed

or destroyed by the fiction of some other state's decree based upon the same grounds and the same facts which had been judicially declared and a decree rendered thereon in New York. The Appellate Court in Florida simply held that since she had notice that a suit for divorce was filed in Florida and she made no effort to contest it, she was forever barred. In effect and by reasonable logic, if Sol Simons had been defeated in his suit in Florida in 1952, he could then have gone to any other state until he had exhausted each forum.

(f) ARGUMENT. The decision by this Court of *Gene Durfee v. Julia E. Duke*, 375 U. S. 106, 84 S. Ct. 242, held clearly that the full faith and credit provisions of the Constitution and the statutory law of Congress requires every state to give to a judgment at least the res judicata effect which the judgment would be accorded in the state which rendered it. Headnote 3, taken from 84 S. Ct. 242, provides:

> "By constitutional provision for full faith and credit, local doctrines of res judicata become a part of national jurisprudence and are therefore federal questions cognizable before the Supreme Court."

Headnote 5:

> "A judgment of a court in one state is conclusive upon merits in a court in another state only if court in first state has power to pass on the merits, but when second court's inquiry discloses that those questions had been fully and fairly litigated and finally decided in the court which rendered the original judgment that judgment is entitled to full faith and credit."

In the body of the opinion (see 84 S. Ct. 247), this Court held:

> "It is argued that an exception to this rule of jurisdictional finality should be made with respect to

cases involving real property because of this Court's emphatic expressions of the doctrine that courts of one State are completely without jurisdiction directly to affect title to land in other States. This argument is wide of the mark. Courts of one State are equally without jurisdiction to dissolve the marriages of those domiciled in other States. But the location of land, like the domicile of a party to a divorce action, is a matter 'to be resolved by judicial determination.' Sherrer v. Sherrer, 334 U. S. at 349, 68 S. Ct. at 1090, 92 L. Ed. 1429. The question remains whether, once the matter has been fully litigated and judicially determined, it can be retried in another State in litigation between the same parties. Under the reason and authority of the cases we have discussed, it is clear that the answer must be in the negative."

In the petition for certiorari which was granted by this Court counsel for Lucy C. Simons pointed out certain decisions of the Supreme Court of Florida which had originally recognized this rule—*Gaylord* v. *Gaylord*, 45 So. 2d 507, and a recent opinion by the District Court of Appeal of Florida, Second District, a 1961 decision, in the case of *Edgar* v. *Edgar*, 126 So. 2d 585. In both of these cases the Courts of Florida have given recognition to the provisions of Section 1, Article IV, of the Constitution of the United States, and pointed out that in previous cases the Supreme Court of Florida had held that the State of Florida had no desire to furnish a legal haven for fugitive husbands (*Sackler* v. *Sackler*, 47 So. 2d 292, 18 A.L.R. 2d 856), and pointed out:

"* * * we might well add to that expression of public policy that an attempt to escape responsibility to pay child support is looked upon with equal disfavor."

In a more recent case by the District Court of Appeal of Florida, Second District, *Clarence A. Borst, Appellant,*

v. *Anna Borst, Appellee,* a 1964 decision, 161 So. 2d 693, that Court held;

Headnote 1:

"Florida court was precluded, by due process of law requirements, from affecting, on application of former husband who resided in Florida, alimony rights vested in wife under foreign decree where marriage, divorce and alimony proceeding all took place outside of Florida and wife had not submitted herself to jurisdiction of Florida court.

Headnote 2:

"Former wife's vested rights to alimony under foreign decree were personal and subject only to in personam jurisdiction over her, and could not be affected by court which had no personal jurisdiction over her on any theory that former husband's proceeding for relief was in effect quasi in rem."

The said Court quoted with approval in this opinion from *17 Am. Jur., Section 987 (Am. Jur. 17A)*, and cited with approval from Section 987:

"The divorce court must have jurisdiction of the wife in personam in order to adjudicate or cut off her right to alimony. While a court may gain jurisdiction to grant a divorce by constructive service upon a non-resident wife, such service does not give it jurisdiction to adjudicate alimony rights, and so it is held that an ex parte divorce, obtained by the husband, does not necessarily affect the right of the wife to alimony under the laws of another state, and any express or implied adjudication against her claim is void and will not be given effect by comity or under the full faith and credit clause."

Further quoting, the Court quoted certain excerpts from *17A Am. Jur., Section 988,* as follows:

"The rule is that where a wife obtains a divorce a mensa or a judicial separation and an award of alimony in one state, another state can not adjudicate or terminate the right unless it gains jurisdiction in personam over the wife. A judgment for alimony is a property right, intangible in nature, and jurisdiction over an intangible can only arise from jurisdiction over the person."

Then the Court proceeds to analyze (text, p. 695) certain opinions of this Court, as follows:

"There are a series of cases from the United States Supreme Court which we think are conclusive on the issue herein. It is only necessary to note herein what we consider a 'trilogy' of decisions on the subject. This 'trilogy' is composed of Estin v. Estin, 1948, 334 U. S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561; Armstrong v. Armstrong, 1956, 350 U. S. 568, 76 S. Ct. 629, 100 L. Ed. 705; and Vanderbilt v. Vanderbilt, 1957, 354 U. S. 416, 77 S. Ct. 1360, 1 L. Ed. 2d 1456."

The Florida Court has apparently acted upon the erroneous presumption that a service of process by publication or mailing from the Florida Court to a resident of New York is the equivalent of personal service. This is an erroneous conclusion and, as pointed out in the opinion in the case of *Borst* v. *Borst*, above cited, on page 695, the Supreme Court of the United States has settled that principle of law in the case of *Armstrong* v. *Armstrong*, 1956, 350 U. S. 568, 76 S. Ct. 629, 100 L. Ed. 705, in which this Court (U.S. Supreme Court) reapplied the doctrine of *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 465:

As we will point out in the next portion of this brief, a complete separate maintenance decree under the law of New York when entered by the Supreme Court of New York, a Court of record, where both parties were residents of the state at that time and both were present before the

Court, determines two things: (1) the right of permanent separation and the right to the lifetime alimony which is awarded by the Court; and (2) retains the status of the wife, if she is the plaintiff, as the legal widow of the husband upon his death. These are property rights. Where the bulk of the estate, if not all, consists of intangible personal property, the title to that intangible property and the location or legal situs of that personal property accompanies the person of the owner. *Beverly Beach Properties* v. *Nelson*, 68 So. 2d 604, certiorari denied *Rensta* v. *Beverly Beach Properties*, 75 S. Ct. 27, 348 U. S. 816, 99 L. Ed. 643.

One of the controlling cases by this Court which has been often recognized as controlling by the Florida Courts, but ignored in this case, is *Estin* v. *Estin*, 1948, 334 U. S. 541, 68 S. Ct. 1213, 92 L. Ed. 1561. The other two cases which have been termed as a part of the "trilogy" of this Court's opinions on this subject are *Armstrong* v. *Armstrong*, 1956, 350 U. S. 568, 76 S. Ct. 629, 100 L. Ed. 705, and *Vanderbilt* v. *Vanderbilt*, 1957, 354 U. S. 416, 77 S. Ct. 1360, 1 L. Ed. 2d 1456.

A reference to the contents and substance of the opinion of the Estin case will demonstrate this point. As appears in this case the wife had obtained a New York judgment for separation and an award of permanent alimony. The husband had thereafter brought action and obtained a divorce in Nevada, but the wife was not personally served and did not appear in that action. While the husband was still living he was then joined in a petition in the Courts of New York to require him to continue to make his alimony payments. The husband then by way of defense pleaded the Nevada divorce decree. The New York Courts denied that relief, and through several appeals the Court of Appeals of New York, 296 N. Y. 308, 73 N. E. 2d 113, affirmed that ruling. This Court granted

certiorari and after some discussion by this Court of the background of the litigation and decisions, both the New York and Nevada Courts, this Court said (see text, page 1218, 68 S. Ct., and page 548 of 334 U. S. 541):

"The New York judgment is a property interest of respondent, created by New York in a proceeding in which both parties were present. It imposed obligations on petitioner and granted rights to respondent. The property interest which it created was an intangible, jurisdiction over which cannot be exerted through control over a physical thing. Jurisdiction over an intangible can indeed only arise from control or power over the persons whose relationships are the source of the rights and obligations. Cf. Curry v. McCanless, 307 U. S. 357, 366, 59 S. Ct. 900, 905, 83 L. Ed. 1339, 123 A.L.R. 162.

Jurisdiction over a debtor is sufficient to give the State of his domicile some control over the debt which he owes. * * * But we are aware of no power which the State of domicile of the debtor has to determine the personal rights of the creditor in the intangible unless the creditor has been personally served or appears in the proceeding. The existence of any such power has been repeatedly denied. Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, etc. * * *

We know of no source of power which would take the present case out of that category. The Nevada decree that is said to wipe out respondent's claim for alimony under the New York judgment is nothing less than an attempt by Nevada to restrain respondent from asserting her claim under that judgment. That is an attempt to exercise an in personam jurisdiction over a person not before the court. That may not be done. Since Nevada had no power to adjudicate respondent's rights in the New York judgment, New York need not give full faith and credit to that phase of Nevada's judgment."

It is true that there were two dissenting opinions in that case, but the effect of the dissents appears to raise the question as to the doctrine of a divisible divorce. Mr. Justice Frankfurter in his dissenting opinion pointed out that if under the full faith and credit clause Nevada was required to recognize the finality of the separation proceedings in New York, then Nevada would have to give effect to that and the divorce would not be valid.

Mr. Justice Jackson went beyond that point and pointed out that three months after the separation and the award of alimony had been made by the New York Court in October, 1943, the husband then journeyed to Nevada and in three more months began a divorce action. No process was served on the wife in Nevada, and he mentions in the opinion (see first column of text, page 1221, (334 U. S., page 554)), as follows:

> "* * * she was put on notice only by constructive service through publication in New York. Notified thus of what was going on, she was put to this choice: to go to Nevada and fight a battle, hopeless under Nevada laws, to keep her New York judgment, or to do nothing. She did nothing, and the Nevada court granted the husband a divorce without requiring payment of alimony.
>
> Now the question is whether the New York judgment of separation or the Nevada judgment of divorce controls the present obligation to pay alimony. The New York judgment of separation is based on the premise that the parties remain husband and wife, though estranged, and hence the obligation of support, incident to marriage, continues. The Nevada decree is based on the contrary premise that the marriage no longer exists and so obligations dependent on it have ceased.
>
> The Court reaches the Solomon-like conclusion that the Nevada decree is half good and half bad un-

der the full faith and credit clause. It is good to free the husband from the marriage; it is not good to free him from its incidental obligations. Assuming the judgment to be one which the Constitution requires to be recognized at all, I do not see how we can square this decision with the command that it be given full faith and credit. For reasons which I stated in dissenting in Williams v. North Carolina, 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 279, 143 A. L. R. 1273, I would not give standing under the clause to constructive service divorces obtained on short residence. But if we are to hold this divorce good, I do not see how it can be less good than a divorce would be if rendered by the courts of New York."

The same result was reached by this Court in *Kreiger* v. *Kreiger*, 334 U. S. 555, 68 S. Ct. 1221.

In the subsequent case of *Vanderbilt* v. *Vanderbilt*, 354 U. S. 416, 77 S. Ct. 1360, 1 L. Ed. 2d 1456, the issues were slightly different. Cornelius Vanderbilt, Jr. and Patricia Vanderbilt were married in 1948. They separated in 1952 while they were living in California. The wife moved to New York, where she had resided since 1953. While the wife was a resident of New York the husband filed a suit for divorce in Nevada. The wife was not personally served and did not appear before the Nevada Court, but that Court entered a decree for divorce in June, 1953. About ten months later, in April, 1954, Mrs. Vanderbilt instituted an action in New York, praying for separation from Cornelius Vanderbilt, Jr. and asking for alimony. The New York Court did not have personal jurisdiction over him, but it did sequester certain of his property within the state. Vanderbilt appeared specially and, among other defenses, contended that the full faith and credit clause of the United States Constitution compelled the New York Court to treat the Nevada divorce as having

ended the marriage and as having destroyed any duty of support which he owed the respondent. The New York Court found that the Nevada decree was valid insofar as it dissolved the marriage, but it nevertheless entered an order under § 1170-b of the New York Civil Practice Act, directing Vanderbilt to make designated support payments. Vanderbilt then petitioned this Court claiming that the New York decree violated the full faith and credit clause, and this Court held that the Nevada divorce court was as powerless to cut off the wife's support right as it would have been to order the husband to pay alimony if the wife had brought the divorce action and he had not been subject to the divorce court's jurisdiction.

Again Mr. Justice Frankfurter dissented, and in substance his dissent was based upon this statement (see 77 S. Ct., text page 1365):

> "Calling alimony a 'personal claim or obligation' solves nothing. I note this concern for 'property rights,' but I fail to see why the marital relation would not be worthy of equal protection, also as a 'personal claim or obligation.' It may not be translatable into dollars and cents, but that does not make it less valuable to the parties. It cannot be assumed, by judicial notice as it were, that absent spouses value their alimony rights more highly than their marital rights. Factually, therefore, both situations involve the adjudication of valuable rights of an absent spouse, and I see no reason to split the cause of action and hold that a domiciliary State can ex parte terminate the marital relation, but cannot ex parte deny alimony. 'Divisible divorce' is just name-calling."

Mr. Justice Harlan also dissented, but in this dissenting opinion Justice Harlan points out that there would be a difference where the wife obtained a domicile in New York—for example, after the ex parte divorce had been

granted in Nevada—and a case where the parties had both lived in New York where the New York Courts granted a permanent separation decree.

To be perfectly frank with this Court, the decisions by this Court in the past have been somewhat difficult for the average lawyer to understand. We are not too sure that it is necessary in the case at bar for all of these points that conflict be adjusted or clarified. Here we have a case that certainly goes beyond any of the reported decisions by this Court on the subject matter. We are not actually concerned with the matrimonial status to the extent that that point was involved in the Estin case, the Vanderbilt case or the Armstrong case. Mr. Simons was in New York in 1960 when he died, or at least his body was present in New York. Up until the date of his death he made the alimony payments to his wife, who also lived in New York. His intangible property was vested in New York insofar as situs and title are concerned. The New York statutes create a widow's rights into a deceased husband's estate which can not be taken away from her by a Will. Similar rights are protected for the benefit of the wife under the Florida law. Both of these rights are an incident to the fact that a woman is the legal widow of the husband who is deceased. These statutory rights, whether it be in New York or in Florida, are an essential part of any contract of marriage. If Sol Simon's Will had been probated in New York there is no question about the rights of Mrs. Lucy C. Simons. Can that right be completely annulled, cancelled and discharged because Sol Simons left a Will appointing a Florida bank as executor and in that Will all rights of the wife were eliminated? If Lucy C. Simons had a property right under the prior decree in New York, she had the right to be his wife so far as property rights were concerned after his death, because that is what the

New York law provided for. That is what the Florida law provides for.

Sometimes in the course of modern events an exact precedent from former opinions of this Court or State Courts can not always be cited. However, is that necessary? There are certainly no cases which could be cited as a precedent against the contention of Lucy C. Simons. We do not here have any question that Sol Simons remarried or that Lucy C. Simons remarried. If the husband as a part of the separation decree in New York had even entered into a contract to make a Will protecting his wife in the event of his death, that contract would be enforceable in any state in the Union where the husband died. If alimony is paid or required to be paid even in the divorce action for the lifetime of the widow, then that is a claim against the husband's estate (see *Aldrich* v. *Aldrich* (Fla. 1964), 163 So. 2d 276, wherein the Supreme Court of Florida rendered an advisory opinion to this Court on this subject matter).

The Florida Supreme Court has held in what is commonly referred to as the "first *Gordon* v. *Gordon* case" (1948), 36 So. 2d 774, 160 Fla. 838, as follows:

> "A final decree of Pennsylvania court denying wife a divorce on ground of indignities to her person was entitled to full faith and credit in wife's Florida divorce action on ground of extreme mental cruelty, where character of testimony produced by wife in Florida case was essentially the same as that which she would have been required to present to establish her charge of indignities to her person had she pursued her action in Pennsylvania, in which state she was given ample notice and opportunity to be heard."

After the opinion by the Supreme Court in that case denying the wife's attempt to obtain a re-adjudication of

the Pennsylvania action in the Florida Courts, the wife was permitted to file an additional or amended complaint charging that the husband had been guilty of desertion, and based upon different factual matters. The lower Court in Florida granted the wife a divorce upon the new grounds and new facts not previously litigated in the Pennsylvania action. The Supreme Court of Florida affirmed that decision, 59 So. 2d 40, *headnote 3*, wherein it said:

> "The general proposition that when final decree or judgment of court of competent jurisdiction becomes absolute it puts at rest and entombs in eternal quiescence every justiciable, as well as every actually adjudicated issue, is not controlling except in instances where second suit is between same parties and is predicated upon same cause of action as was first; and if second suit is bottomed upon different cause of action than that alleged in prior case, estoppel by judgment comes into play, and only those matters actually litigated and determined in initial action, and not other matters which might have been, but were not, litigated or decided, are foreclosed."

When Mr. Simons died in October, 1960 and the widow in New York found that he had left a Will, with a Florida executor, claiming to be a Florida resident, in which the wife was totally eliminated (see P. Tr. 307), then what remedy was left to the wife? She had contended that she was fully protected by the proceedings in New York, but the assets had been removed from the place of her husband's domicile in New York to the State of Florida. The Courts of Florida take the position that regardless of what she may be or what her legal status may be in New York, she can not have any relief in the Florida Courts, where the assets are lodged, because there appears on the surface to be a decree from a Circuit Court of Florida entered in April, 1952 in an ex parte divorce case which separated

the marriage of Sol Simons and Lucy C. Simons. The Florida Court refuses to even entertain the merits of a claim that this divorce decree was void because it was contrary to the full faith and credit clause, or even that it was void because Sol Simons did not have the residence jurisdiction requirements in Florida. They simply take the position, both in the lower Court and in the Appellate Courts, that once it is established that the process by substituted service by mail and publication was served upon Mrs. Simons in New York City, or even if she knew about the proceedings in the case, she, her marital status, and her property rights as the widow were forever foreclosed.

It is true that in the state action Lucy C. Simons challenged the jurisdiction of the Florida Court and offered what we say is conclusive testimony that Sol Simons' purported residence in Florida was a mere sham and a fraud, yet the Florida Courts did not even concern themselves with that problem. Lucy C. Simons showed by undisputable testimony that the grounds upon which the suit was filed in Florida, some six years after the final determination in New York, were identical as to charges and as to facts and, therefore, were void under the United States Constitution. Yet the Florida Courts paid no attention to that claim.

CONCLUSION

A decision such as we find now in the Florida Courts, if permitted to stand, makes the constitutional provisions and Acts of Congress pursuant thereto regarding full faith and credit a sham and a mockery. If such a decision could stand, then all that a New York resident would have to do would be to cross the Hudson River and name a bank or trust company in Jersey City, New Jersey, as his executor.

All he would have to do is to get an ex parte divorce of some kind—whether it be from Nevada, Alabama, Arkansas, Florida or any of the other so-called "easy divorce states", and when the widow in New York sought to exercise her statutory property rights upon the death of her husband, simply to meet that demand by saying that some state had granted an ex parte divorce in favor of the husband. Perhaps they could even plead a Mexican divorce procured by mail order.

This is a typical example of a sheer fraud practiced on the Courts of New York, and even practiced on the Courts of Florida. This kind of a decision even makes a mockery out of that nebulous doctrine of "a divisible divorce", which even though perhaps justified at the time it was enunciated, certainly should have no permanent standing in the jurisdiction of the United States and this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three (3) true and correct copies of the Brief of Petitioner on the Merits were furnished by mail, by depositing same in a United States mailbox, with first class postage prepaid, addressed to counsel of record for the respondent, Marion E. Sibley and Irving B. Levenson, 605 Lincoln Road, Miami Beach, Florida 33139, on this ..... day of January, 1965.

_____,
WILLIAM GRESHAM WARD.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 363

LUCY C. SIMONS,
Petitioner,

vs.

MIAMI BEACH FIRST NATIONAL BANK,
As Executor of the Estate of
SOL SIMONS, Deceased,
Respondent.

BRIEF FOR RESPONDENT ON THE MERITS

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§ 48.04, Florida Statutes, 1951, Entitled: "Sworn Statement, Natural Person As Defendant" 4, 10, 12, A3-A4
§ 48.08, Florida Statutes, 1951, Entitled: "Notice To Appear, Form" 4, 11, 12, A4-A5
§ 48.09, Florida Statutes, 1951, Entitled: "Notice To Appear, Return Day" 4, 11, 12, A5
§ 48.10, Florida Statutes, 1951, Entitled: "Notice To Appear, Publication, Proof And Recording Thereof" 4, 11, 12, A5
§ 48.13, Florida Statutes, 1951, Entitled: "Notice To Appear, Mailing of" 4, 11, 12, A6
§ 48.14, Florida Statutes, 1951, Entitled: "Time For Appearance, Decrees Pro Confesso And Default Judgments" 4, 13, A6
§ 59.08, Florida Statutes, 1951, Entitled: "Time For Taking Appeals Or Filing Petitions For Certiorari" 4, A6

TEXT

11 Fla. Jur., Dower, Sec 15, p. 46 53-54

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 363

LUCY C. SIMONS,
Petitioner,

vs.

MIAMI BEACH FIRST NATIONAL BANK,
As Executor of the Estate of
SOL SIMONS, Deceased,
Respondent.

BRIEF FOR RESPONDENT ON THE MERITS

PREFACE

At the threshold, it is imperative to bring this case into precise and proper focus. This is not a case of a sister state refusing to recognize, contrary to the constitutional requirements of full faith and credit, a final decree of another state. It is an attack in Florida on a Florida final decree of divorce, dated April 30, 1952, brought in the Florida court of rendition by the divorced wife (petitioner), who had notice and an opportunity to defend the Florida divorce proceeding when it was instituted on March

11, 1952, ten (10) years prior to the present challenge upon the resultant decree; but, who, ten (10) years earlier, elected to ignore the Florida proceeding. Florida did not fail to give recognition to the earlier New York separate maintenance decree providing the petitioner with alimony. The Florida decree did not in any way whatever disturb, change, or affect the New York decree. The petitioner failed to assert the now claimed res adjudicata effect of the New York separate maintenance decree as an affirmative defense in the Florida divorce proceeding. Actually, no court has either decided or considered the *res adjudicata* effect of the New York separate maintenance decree because it was not raised as an affirmative defense in the divorce suit, and its attempted assertion ten (10) years later in this suit, in the court of rendition, comes too late and is precluded. Hence, petitioner seeks review of something that she failed to appropriately raise and which was in fact never decided when and where it should and could have been considered. This is an obvious attempt to turn this, the highest court in the land, into a trial tribunal.

Totally removing this case from the realm of a genuine full faith and credit question, the petitioner, after her former husband, Sol Simons, died (on October 26, 1960), filed, pursuant to the applicable Florida Statutes (Florida Statutes, Chapter 731.35 (1); Appendix, p. A1), an election to take dower. It is undisputed that the estate of Sol Simons consists entirely of personalty and that the jurisdiction to probate such property follows the domicile of the decedent. There is and never has been a question regarding any property of Sol Simons located outside of Florida. The petitioner's election to take dower, as the governing Florida statute requires, was executed by her on her oath. She swore in that election to take dower, which was filed in the Florida probate proceeding, which

is the only probate proceeding pending anywhere involving Sol Simons' estate, that Sol Simons died a domiciliary of the State of Florida. The pertinent content of the petitioner's election to take dower reads as follows (Def. Ex. R; R. 306, p. 202):

> "Lucy C. Simons, the widow of Saul Simons, Deceased, *who died while a resident of Dade County,* Florida; being dissatisfied with the portion of the estate of her husband to which she is entitled under the will of her husband, does hereby elect to take dower in the estate of her husband as provided by law." (Emphasis supplied)

There never has been a contest in regard to the jurisdiction of the Florida Probate Court over the estate or any part thereof of the deceased, Sol Simons. The Petitioner's election to take dower constitutes a demand for the Florida Probate Court's aid and is an affirmation of that court's jurisdiction. Consequently, no state in the union is involved except Florida, which was asked by the petitioner to vacate its own decree in order to allow her to take a dower interest in a Florida estate of a deceased Florida domiciliary to which she was not entitled under the laws of Florida.

FLORIDA STATUTES INVOLVED

The following is a list of the Florida Statutes involved in this case which are quite lengthy; thus their text is set forth in the appendix to this brief:

1. § 731.35 (1), Florida Statutes, 1959, Entitled: "Election To Take Dower."

2. § 65.01, Florida Statutes, 1951, Entitled: "Divorce To Be By Bill In Equity."

3. § 65.02, Florida Statutes, 1951, Entitled: "Residence Required."

4. § 65.03, Florida Statutes, 1951, Entitled: "All Grounds To Be A Vinculo."

5. § 65.04, Florida Statutes, 1951, Entitled: "Grounds For Divorce."

6. § 65.06, Florida Statutes, 1951, Entitled: "Proceedings Against Nonresident Defendants."

7. § 48.01 (4), Florida Statutes, 1951, Entitled: "Service Of Process By Publication, In What Cases."

8. § 48.02 (1), Florida Statutes, 1951, Entitled: "Service Of Process By Publication, Upon Whom."

9. § 48.03, Florida Statutes, 1951, Entitled: "Sworn Statement As Condition Precedent".

10. § 48.04, Florida Statutes, 1951, Entitled: "Sworn Statement, Natural Person As Defendant".

11. § 48.08, Florida Statutes, 1951, Entitled: "Notice To Appear, Form".

12. § 48.09, Florida Statutes, 1951, Entitled: "Notice To Appear, Return Day".

13. § 48.10, Florida Statutes, 1951, Entitled: "Notice To Appear, Publication, Proof And Recording Thereof".

14. § 48.13, Florida Statutes, 1951, Entitled: "Notice To Appear, Mailing of".

15. § 48.14, Florida Statutes, 1951, Entitled: "Time For Appearance, Decrees Pro Confesso And Default Judgments".

16. § 59.08, Florida Statutes, 1951, Entitled: "Time For Taking Appeals Or Filing Petitions For Certiorari".

STATEMENT OF THE CASE

The factual background of every case is important but in this case it is extremely important for two (2) reasons:

a) That an accurate presentation of the facts will reveal that there has not been any violation of the full faith and credit clause of the United States Constitution; and

b) That Petitioner has not accurately presented the facts of this case and has, thereby, created a false impression that Sol Simons was a New York domiciliary and that Florida has somehow deprived the petitioner of some right that she was entitled to under the New York separate maintenance decree. In regard to the latter, it will be demonstrated in the argument section of this brief that petitioner has, wittingly or otherwise, attempted to transpose her right to alimony, which ceased upon the death of her former husband and which she was never deprived of, into an unjustified right to a dower share of her former husband's estate. Under these circumstances, the respondent is constrained to accurately restate this case in accordance with the record.

A) The Facts Before the Florida Divorce Suit Was Commenced

The petitioner, Lucy C. Simons, instituted separate maintenance proceedings in New York in 1946 and obtained a separate maintenance decree allowing her alimony. In September, 1951, petitioner applied in the New York separate maintenance proceeding for an increase of alimony. (R. 92) Her lawyer, Jerome Mayer, testified that he had no present recollection of the matter and did not dispute the testimony he heard given by Myron J. Greene, Sol Simons' lawyer. (R. 87-91) Greene testified that

shortly after the proceeding for an increase in alimony had begun in New York, Sol Simons left the state of New York and established permanent residence in Florida. (R. 92-93) From correspondence in Greene's file (which was admitted in evidence as Def. Ex. Q; R. 303-305, p. 202), Greene testified that Sol Simons moved to Florida prior to November 19, 1951. (R. 93)

At this juncture, it is significant to consider certain conclusive documentary evidence. Sol Simons executed, under oath, a "Declaration of Domicile and Citizenship" addressed to the State and County Tax Assessor for Dade County, Florida, dated November 29, 1951, which was recorded among the public records of Dade County, Florida, on December 10, 1951, bearing Dade County Circuit Court Clerk's File No. AA 123940, which states (Def. Ex. A; R. 271, pp. 155-156):

> "This is my declaration of Domicile and Citizenship in the State of Florida that I am filing this day in accordance, and in conformity with Chapter 20412 Laws of Florida, Acts of 1941.
>
> I was formerly a legal resident of New York City, N. Y. and I resided at 6910 Yellowstone Boulevard. However, I have changed my domicile to and am and have been a bona fide resident of the State of Florida since the 19th day of November, 1951, and I reside at 1110 Venetian Way, Miami Beach, Dade County, Florida, and this statement is to be taken as my declaration of citizenship, actual legal residence and domicile in the State of Florida.
>
> I have signed a one-year's lease for my present apartment at 1110 Venetian Way, Miami Beach, Florida, and have become associated with Fruit Sales Corporation, a Florida concern.
>
> I Further Certify that I will register at my local address when the registration books reopen, and com-

ply with all other requirements of a legal resident of this State.

I Further Certify that I have no intention to return to my former domicile, and I intend to remain in Miami Beach, Dade County, Florida, permanently.

/s/ Sol Simons
1110 Venetian Way, Miami Beach"

The apartment lease referred to in the above-quoted "Declaration of Domicile and Citizenship" was admitted in evidence as a part of a composite exhibit containing nine (9) yearly leases, each of which was executed by Sol Simons and his landlord. (Def. Ex. B; R. 272-273, 157) The first lease (the one specifically mentioned in the declaration of domicile) was dated November 17, 1951, and covers the term of one (1) year from December 1, 1951 to November 30, 1952, and demises to Sol Simons the residential premises at 1110 Venetian Way, Miami Beach, Dade County, Florida. (R. 273) A yearly lease for every year thereafter, up to and including 1960, was executed by Sol Simons and his landlord for the same residential premises, namely, 1110 Venetian Way, Miami Beach, Dade County, Florida. The last lease signed by Sol Simons is particularly significant because the expiration date is November 30, 1960, and the man died one month before that, on October 26, 1960. (R. 272) The pertinence of these uncontradicted facts is a demonstration that the record does not substantiate the oft repeated unsupported statement in petitioner's brief that Sol Simons died a resident of New York. It is incredible that petitioner can make that statement in her petition and brief in the face of her own sworn election to take dower that specifically declares to the contrary. (Def. Ex. R; R. 306, 202) Additionally these facts establish that Sol Simons was a bona fide resident and domiciliary of the State of Florida for the prerequisite

period of time prior to the institution of the Florida divorce suit and that Florida had jurisdiction of the marital res. It also demonstrates the gross inaccuracy of petitioner's unsupported accusation that Sol Simons came to Florida as a transient divorce seeker.

The New York proceeding for an increase of petitioner's alimony was heard in New York on January 29, 1952. (R. 94) Sol Simons testified at that hearing, in the petitioner's presence, that he was a permanent resident of Florida, residing at 1110 Venetian Way, Miami, Florida. (Pl. Ex. 4; R. 240-267, 94). The petitioner, on cross-examination at the trial of this cause, admitted that she heard Sol Simons testify, at the alimony increase hearing on January 29, 1952, that he was a permanent resident of Miami, Florida (R. 207-208):

> "Q. You were present, Mrs. Simons, in court in New York on January 29, 1952, when your husband testified before the Honorable David L. Weil, the official referee. Is that right?
>
> A. Yes.
>
> Q. You heard him testify, did you not?
>
> A. Yes.
>
> Q. You heard him testify at that time, in that hearing, that he was a resident of Florida, and his address was 1110 Venetian Way, Miami, Florida. Is that correct?
>
> A. He testified to that, yes."

There are additional facts that establish that Sol Simons was a bona fide resident and domiciliary of Florida, and not a migratory divorce hunter, as the petitioner glibly charges without foundation in fact. At the

increase hearing in New York, Sol Simons testified that he transferred his business bank account from a New York bank to the Miami Beach First National Bank (the respondent). The testimony reads as follows (R. 251):

> "The Chase account was transferred to the Miami Beach First National Bank and that is where it is. Just a transfer of funds and a continuation."

The Miami Beach First National Bank (the respondent) is executor of Sol Simons' estate. The respondent became Sol Simons' bank, was named as his executor in his last will and testament, dated May 7, 1952 (Def. Ex. S; R. 307, 203), and remained such until his death some eight (8) years later. Sol Simons' last will and testament states at the outset (R. 307):

> "I, Sol Simons, of the County of Dade, the State of Florida, ..."

The will was witnessed by three (3) Florida residents. (R. 315) Furthermore, Sol Simons, when he made Florida his domicile, formed a Florida corporation named Fruit Sales, Inc. That business entity was organized on November 19, 1951. A composite exhibit in evidence (Def. Ex. H; R. 284, 163), contained the original corporate charter and the annual corporate reports for the years 1951 through 1960, which were filed in the office of the Secretary of State for the State of Florida, and each states, under oath, that Sol Simons was the president and director of Fruit Sales, Inc., residing at 1110 Venetian Way, Miami, Florida. Sol Simons' accountant, Sidney Wasserman (a Florida Certified Public Accountant) testified that Sol Simons became his client in November, 1951. (R. 172) Wasserman testified that Sol Simons filed his 1952 estimated federal income tax return in Florida, and all of his subsequent yearly federal income tax returns were filed in Florida. (R. 173)

Sol Simons' federal income tax returns for the years 1952 through 1960 were admitted in evidence as a composite exhibit. (Def. Ex. J; R. 288, 176) The accountant testified that the New York apartment that Sol Simons retained, after he moved to and became a permanent resident of Florida, was deducted, after 1951, as a complete and total business expense on his federal income tax returns. (R. 177-178) Sol Simons' lawyer, Seymour Liebman, testified that Sol Simons retained the New York apartment strictly as a business office, as his New York headquarters, since he was frequently required because of business to be in the northeastern part of the country. (R. 169) The record undisputedly reflects that Sol Simons was a commission broker who traveled extensively throughout the nation and the world, buying and selling crops of fruit for canning, preserves, wine making and freezing. (See as exemplary R. 164, 168-169, 248-249 and 263)

B) The Florida Divorce Suit

The entire record of the Florida divorce proceeding was admitted in evidence as a composite exhibit. (Pl. Ex. 3; R. 211-239, 17) On March 11, 1952, the bill of complaint for divorce was filed in the Circuit Court for Dade County, Florida, by Sol Simons, as plaintiff, naming Lucy C. Simons (petitioner) as defendant. (R. 211-216) Sol Simons complied with Florida Statutes, Chapter 65.02 (Appendix A1), requiring that the complainant in a divorce suit "must have resided ninety days in the State of Florida before the filing of the bill of complaint." The 11th day of March, 1952, was the one hundred and twelfth (112th) day after November 19, 1951, when Sol Simons became a permanent resident and domiciliary of the State of Florida The sworn bill of complaint for divorce strictly complied with Florida's constructive service statute. (Florida Statute, Chapter 48.04) (Appendix, p. A3) The complaint

stated, under oath, that diligent search and inquiry had been made to ascertain and discover the name and residence of the defendant who was over the age of twenty-one (21) years, and who resided in a state and county other than in Florida, and set forth with particularity that defendant's residence address was (R. 211):

"Lucy C. Simons
Hotel Beacon
75th Street at Broadway
New York, N. Y."

Notice of publication was duly issued by the Clerk of the Circuit Court in and for Dade County, Florida, on the day the bill of complaint for divorce was filed, namely, March 11, 1952, and such notice was duly published in a qualified newspaper, The Jewish Floridian, once each week for four (4) consecutive weeks on March 14th, 21st, 28th and April 4th, 1952, and gave the defendant (petitioner) up to and including April 11, 1952, within which to appear and answer. (R. 216-217) The defendant (petitioner) was, therefore, afforded the statutorily required twenty-eight (28) days notice to appear and defend. (Florida Statutes, Chapter 48.09, Appendix p. A5) The clerk's docket stamp reflects that a copy of the notice of publication, together with a copy of the bill of complaint were mailed to the defendant (petitioner) on March 14, 1952. (R. 217) The mailing of the notice of publication and the bill of complaint for divorce were in accordance with Florida Statutes, Chapter 48.13. (Appendix, p. A6) The publication of the notice and the proof thereof (R. 239), were in strict accordance with Florida Statutes, Chapter 48.10. (Appendix, p. A5) The notice of publication itself (R. 216-217), was in the form required by Florida Statutes, Chapter 48.08 (Appendix, p. A4) It will be observed from

the original court file containing the entire Florida divorce proceeding (Pl. Ex. 3; R. 211-239, 17), that each, every and all of the requirements of the applicable and governing provisions of the constructive service statutes (Florida Statutes, Chapters 48.01, 48.02, 48.03, 48.04, 48.08, 48.09, 48.10 and 48.13) (Appendix, pp. A2-A6), were in each, every and all instances and particulars meticulously observed and complied with.

The petitioner admits that she, as defendant in the original divorce suit, did reside at the Beacon Hotel, 75th Street and Broadway, New York, New York, during the year 1952. (R. 114) Moreover, petitioner admits that she received the notice of publication and bill of complaint in the Florida divorce proceeding. The record is peppered with that admission, typical of which is the following (R. 110):

> "Well, I got notice that he had advertised in a Jewish newspaper in Miami that he was suing me for divorce, and I was so startled. . . ."

It was at this point that the petitioner elected to ignore the Florida divorce proceeding. She admittedly had notice and an opportunity to be heard. She could have, but never did assert the now claimed res adjudicata effect of the New York separate maintenance decree allowing her alimony. Had the petitioner appeared and pleaded and proven the affirmative defense of res adjudicata in the divorce suit, the Florida court would have been confronted with the issue and the duty of deciding whether, in fact, the New York alimony decree, under the requirements of the full faith and credit clause of the United States Constitution, was res adjudicata of the cause of action for divorce in Florida. It will be demonstrated in the argument section of this brief that when faced with such an

issue, namely, the alleged res adjudicata effect upon a suit for divorce under full faith and credit of a sister state's separate maintenance decree, the court's inquiry is directed at determining if the causes of action are identical and if the identical facts in issue were actually previously adjudicated. It is not a peremptory matter, but one which, itself, requires judicial scrutiny and decision. It is exactly that issue which the petitioner would have this Court, thirteen (13) years later, decide de novo.

On April 15, 1952 (four (4) days after the expiration of the return day of April 11, 1952), the defendant (petitioner), having failed to either file her answer or otherwise plead in the divorce suit, the chancellor entered a decree pro confesso (R. 218-219), as was statutorily authorized by virtue of Florida Statutes, Chapter 48.14 (Appendix, p. A6). On that same day, April 15, 1952, the cause was duly referred to a special master in chancery who was "directed to take the testimony and report the same, together with his findings of fact and conclusions of law to the Court, with his recommendations". (R. 219) On April 24, 1952, the special master heard the cause (R. 225) and found, inter alia, the following (R. 226-227):

> "The plaintiff has, by competent and corroborated evidence, established that he is a bona fide resident of the State of Florida, and has been such resident for more than ninety (90) days prior to the 11th day of March, 1952, . . ."
>
> "The plaintiff has proved by his corroborated testimony the grounds for divorce alleged in his Bill of Complaint, . . ."

The master recommended that the plaintiff, Sol Simons, be awarded a "Final Decree of Divorce, A Vinculo Matrimonii, from the defendant, Lucy C. Simons." (R. 227)

On April 30, 1952, the chancellor entered a final decree of divorce which was filed on that same day and duly recorded among the public records of Dade County, Florida, on May 1, 1952, in Chancery Order Book 1030, at page 551. (R. 237-238) The final decree of divorce ratified and confirmed the master's report in every particular and provided for the severance of the bonds of matrimony, as follows (R. 237):

> "That the bonds of matrimony heretofore and now existing between the plaintiff, Sol Simons, and the defendant, Lucy C. Simons, be and they are hereby set aside and dissolved and the parties hereto are each of them divorced of and from the other a vinculo matrimonii."

It will be carefully noted that the final decree of divorce did not in any way whatsoever attempt to adjudicate the defendant's right to alimony. The New York separate maintenance decree providing petitioner with alimony remained undisturbed. While the Florida divorce proceeding was pending, the New York court, in the alimony increase proceeding, entered an order on April 1, 1952, increasing petitioner's alimony from $400 per month to $440 per month, retroactively effective October 11, 1951. (Pl. Ex. 5; R. 269, 97) The original New York alimony decree had been reversed by the appellate division of the New York Supreme Court and the amount of alimony reduced from $500 to $400. (R. 257) Petitioner has never contended that she was not paid by Sol Simons during his lifetime the alimony amounts to which she was entitled by virtue of the New York separate maintenance decree and either of its modifications (by appeal and then by increase). Actually, the petitioner concedes that Sol Simons paid her, until his death, every dime to which she was entitled. On page 29, of the petitioner's brief, she states:

"Up until the date of his death, he [Sol Simons] made the alimony payments to his wife. . . ."

The defendant-petitioner was furnished with a certified copy of the final decree of divorce. Seymour Liebman (the lawyer of record who represented Sol Simons in the Florida divorce proceeding) testified (R. 163-164):

"Q. After you had procured the final decree of divorce reflected by that file, did you procure from the Clerk a certified copy of the decree of divorce?

A. Yes, sir.

Q. How many copies do you recall you received?

A. Several. I do not remember whether it was three, four or five. But I know it was sevefal.

Q. After you received and procured photostatic copies of the final decree, what did you do in relation to the plaintiff here, Lucy Simons?

A. I mailed her a certified copy.

Q. I notice that certified copies were procured on May 2, 1952. You mailed it to her after that date?

A. My recollection would be the same date I obtained it.

Q. Do you recall where you mailed it to her? Do you recall her address?

A. The same address to which Mr. Simons was mailing checks, and it was in the 70's, either Hotel Beacon or some address in the 70's. I do not remember just when she moved.

I know there was one time she lived in the Hotel Beacon. I know that was her address at the time of the commencement of the lawsuit.

I know the address to which I mailed the certified copy of the decree was the same address that Mr. Simons was sending the alimony checks.

Q. Did you get any response to that letter enclosing the decree?

A. No, sir.

Q. Did you write a letter, or did you just enclose the decree?

A. I just enclosed the decree."

The then governing Florida Statute regarding the time within which appeals might be taken (Florida Statute, Chapter 59.08) (Appendix, p. vii), provided sixty (60) days after the entry of a final decree within which to take an appeal. The defendant (petitioner) did not appeal. The final decree of divorce passed into repose on June 30, 1952.

C) The Facts Subsequent to the Termination of the Florida Divorce Suit

Petitioner admitted that she held herself out to the public and on official records as a divorced woman (R. 113):

"The Court: Just answer the question, please, ma'am.

How did you designate yourself?

The Witness: Mostly divorced to people I had never met before.

Q. That started in 1946?

A. From that time on, except to my friends.

Q. In your employment or social security and things of that nature, how did you designate yourself?

A. Only divorced."

Sol Simons died on October 26, 1960. (R. 2 and 11) Sol Simons' last will and testament (Def. Ex. S.; R. 307-315, 203) was filed for probate by the respondent on October 31, 1960, in the County Judge's Court, in and for Dade County, Florida (Probate Case No. 51039-B), and letters testamentary were issued that same day to the respondent duly appointing it executor of the estate of Sol Simons. (R. 1-2 and 11) On February 7, 1961, petitioner filed, in the above-stated probate proceeding, her election to take dower (Def. Ex. R.; R. 306, 202), in which she swore, under oath, that Sol Simons died a domiciliary of Florida. The respondent objected to the petitioner's election to take dower on the ground that Lucy C. Simons and Sol Simons were divorced from each other in April, 1952, "by virtue of a final decree of divorce entered in chancery action 148, 091-E, in the Circuit Court of the 11th Judicial Circuit, in and for Dade County, Florida". (R. 2 and 11) The petitioner's claim to dower, as the alleged widow of Sol Simons, remains undisposed of in the Florida Probate Court. (R. 2 and 11)

Thereafter, petitioner instituted this suit.

D) This Case

On February 23, 1962, petitioner filed her bill of complaint in chancery in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. (R. 1-10) This suit is an original bill in the nature of a bill of review to vacate and set aside the ten (10) year old divorce decree that had been rendered by the same court on April 30, 1952. Despite the prolixity of the complaint, analysis reveals that it is a four-pronged attack upon the ten (10) year old divorce decree. The four (4) alleged grounds for setting aside the old decree of divorce, as the District Court of Appeal, Third District of Florida, postulated them, are (R. 321):

"(1) that the husband lacked the necessary Florida residence and had defrauded the court by falsely claiming residence,

(2) that the New York separate maintenance decree was a bar to the divorce suit and that it was a fraud on the court for the husband to fail to disclose the earlier proceeding,

(3) that the decree on its face showed want of jurisdiction, and

(4) that after she received notice of the divorce suit the husband lulled her into inaction."

The record establishes that the petitioner, in 1952, at the time the Florida divorce suit was pending, was interested only in preserving her New York alimony award and decided, after careful deliberation and advice of counsel, to ignore the Florida divorce suit. Consequently, petitioner made an educated decision not to appear in the Florida divorce case and contest the jurisdiction of the Florida court over the marital res, based on the claim now made that Sol Simons was not a bona fide resident of Florida, or to raise the now claimed affirmative defense that the New York separate maintenance decree awarding her alimony was res adjudicata of the cause of action for divorce in Florida. At the trial of this case, petitioner testified, on direct examination, that after she received the notice of publication and bill of complaint for divorce, she telephoned Sol Simons at his New York apartment, from her sister's New York apartment, and that the next day, conveniently accompanied by her sister, she went to see Sol Simons in his New York apartment. (R. 110) On cross-examination, petitioner pinpointed the time by stating that she called Sol Simons, from her sister's apartment in New York, the day after receipt of the notice and the complaint for divorce; and that she and her sister visited

Sol Simons in New York the following day. That pinpointing testimony reads as follows (R. 117):

"How long after you received the notice that he was applying for divorce was it that you went to see him?

A. I called him within a day or two. It must have been about three days.

Q. Then three days after you got the notice that he had sued you for divorce, you went to see him?

A. About that time.

Q. Give me some idea. Would you say the day you received the notice he was suing you for divorce?

A. No. It was the next day. I visited my sister, and I called him up.

Q. Then you went to see him the following day?

A. That's right."

Petitioner related the following as her conversation with Sol Simons (R. 110):

"Q. What was the conversation which took place there?

A. Nothing very startling. We came in, and he greeted us, and we greeted him, and we sat down.

I said, 'What is this paper?'

He said, 'Forget about it. It was in a fit of temper. Just destroy it.'

I said, 'Then I should not do anything about it?'

He said, 'Pay no attention to it. I'm not going through with the divorce,' and he repeated it again that he once said he would never give me a divorce and would never get a divorce."

Petitioner also testified that Sol Simons was angry about the fact that she had not come directly to him for an increase in alimony, rather than starting proceedings. (R. 111) She said she told him, "Well, I like everything to be done legally. I think it's the safest way, and it's the best way." (R. 111) As one might readily expect, the petitioner's sister, Helen Forman, corroborated the petitioner's version of the episode. Petitioner explained that her primary interest was in her alimony and that she took no action in the Florida divorce proceeding in reliance on Sol Simons' statement that the divorce suit would be discontinued. That testimony reads as follows (R. 111):

> "Well, I didn't think there was any necessity. I know nothing about the law, and when Mr. Simons said, 'I'm not going through with this divorce,' I had continued getting my alimony until the date of his death.
>
> I figured if he had gotten the divorce, I certainly wouldn't be getting any alimony.
>
> So, I saw no necessity of doing anything about it. I took it for granted that he meant what he said."

On cross-examination, however, the petitioner admitted that her decision to ignore the Florida divorce suit was, in fact, not based on Sol Simons' purported statement to her, but rather on the advice and counsel of her lawyer. That testimony reads as follows (R. 119-121):

> "Q. Who is Mr. Allan, an attorney you consulted about this notice immediately after you received it?
>
> A. Oh, yes, I called him. I'm sorry.
>
> He said there is no validity to that. He said, 'Pay no attention to it.'

Q. Mr. Allan told you after you received the notice that you were being sued for divorce, that it had no validity in New York?

A. Yes, sir.

Q. And told you to pay no attention to it?

A. Yes, sir.

Q. He also told you, did he not, that New York did not recognize Florida divorces?

A. Well, I had no divorce at the time.

Q. That is what Mr. Allan told you, did he not?

A. Yes.

Q. So, after Mr. Allan told you to ignore it, that it meant nothing, New York did not recognize Florida divorces, you put it away and forgot about it?

A. That's right."

* * *

"Q. After your discussions that you had detailed with your husband, you were still disturbed and wanted the advice of an attorney, did you not?

A. Well, I wanted a little verification.

Q. Sure. When your attorney told you that the Florida divorces were not recognized in New York, to forget about it, were you then satisfied?

A. I was satisfied when my husband told me that.

Q. But you were not satisfied enough, so you went to see a lawyer?

A. A great deal depended on my alimony, that my alimony was continuing, you see.

Q. What was dependent upon it?

A. My existence."

The tale told by the petitioner, which was so readily confirmed by her sister, was conclusively proven by the respondent to be naught but a figment of imagination, concocted in order for the petitioner to lay claim to some part of Sol Simons' estate. Seymour Liebman, Sol Simons' Florida lawyer, testified that after Sol Simons established residence in Florida, as of November 19, 1951, he [Sol Simons] had occasion to leave the State of Florida twice. Once, he went to New York during January, 1952, to attend the hearing on petitioner's application for an increase of alimony. (R. 158) On that occasion, Sol Simons returned to Florida within a matter of days. (R. 158-159) Def. Ex. C (R. 274, 159) is a letter written to Seymour Liebman by Sol Simons, dated February 4, 1952, referring to the New York hearing and stating that Sol Simons would be back in Miami on February 9, 1952. The other occasion was toward the end of February, 1952, when Sol Simons had to go to Chicago on business. (R. 159) On that occasion, Sol Simons wrote a letter to Seymour Liebman from Chicago, stating that he intended to go to New York on March 6th or 7th before returning to Miami. (Def. Ex. D; R. 275, 159) Seymour Liebman testified that Sol Simons drove back from New York to Miami on that occasion. (R. 160) The court admitted in evidence as Def. Ex. E (R. 277, 160) a composite exhibit comprised of paid gasoline slips signed by Sol Simons, dated as follows: March 10, 1952, Forest Hills, New York; March 12, 1952, Richmond, Virginia; March 13, 1952, Lumberton, North Carolina; March 13, 1952, Savannah, Georgia; March 14, 1952, Jacksonville, Florida; and March 17, 1952, Miami Beach, Florida. Those gas slips dated at the places indicated establish conclusively that Sol Simons was en

route from New York to Miami, Florida, from March 10 through March 17, 1952. On March 18, 1952, Sol Simons made and executed an application for an automobile title certificate, which was notarized in Dade County, Florida, on that date. (Def. Ex. F; R. 279, 160) Two ladies testified that they were public stenographers who did part-time work for Sol Simons. They each testified that they went to his apartment at the Sandpiper Villas, at 1110 Venetian Way, in Dade County, Florida, where he personally dictated correspondence to them and they in turn typed it in his presence in final form for his signature. Sylvia Sherman testified that she took dictation here in Miami, Florida, from Sol Simons on March 19, 20, 29, 31, and April 1, 26, 28, 29, and May 1, in the year 1952. (R. 185-192) Copies of the letters dictated to Sylvia Sherman by Sol Simons and transcribed by her, on the dates specified, were admitted in evidence as a composite exhibit. (Def. Ex. M; R. 297, 190) Dorothy Newhoff Cohen similarly testified that she did secretarial work for Sol Simons and that he dictated correspondence to her at his Miami Beach apartment on March 24, 25, 26, and April 8, 11, 17, and 18, in the year 1952. (R. 192-197) Copies of the correspondence for the dates stated were admitted in evidence as a composite exhibit. (Def. Ex. O; R. 300, 197) Logical deduction conclusively proves that Sol Simons was not in New York at the time when Lucy Simons and her sister testified they had a conversation with him. The Dade County Circuit Court clerk's docket stamp, in the original file of the divorce suit, proves that the notice of publication and copy of the complaint for divorce were mailed to the petitioner on March 14, 1952. (R. 217) In the regular course of mail, petitioner received those papers by no later than March 17, 1952. The conversation supposedly took place within two (2) days thereafter, which makes

it March 19, 1952, at which time Sol Simons was in Miami dictating correspondence to Sylvia Sherman.

In addition, Sol Simons' lawyer, Myron J. Greene, testified that he had conversation in New York with Lucy Simons' lawyer, Jerome Mayer, regarding the Florida divorce proceeding. (R. 96) Mr. Greene wrote to Sol Simons on April 3, 1952, and stated "in the light of recent telephone conversations which I had with Mr. Jerome Mayer, I am of the opinion that they will appear and contest your divorce action in Florida." (Pl. Ex. 5; R. 269, 97) Sol Simons wrote in reply: "I note your opinion from your conversation with Mr. Mayer that they will appear to contest my divorce action. I would welcome such an appearance which will afford me the opportunity of presenting the facts again to prove that perjury has been committed." (Pl. Ex. 6; R. 270, 97) Clearly, Sol Simons did not prevent the petitioner from appearing in the Florida divorce suit, but, on the contrary eagerly awaited her appearance in Florida. It will be recalled that Mayer (petitioner's lawyer) had no recollection of the matter and did not dispute Greene's testimony.

Def. Ex. P (R. 301, 127 and 201-202) was offered in evidence to rebut petitioner's statement that she and Sol Simons were on friendly terms. That letter was written to Sol Simons, at 1110 Venetian Way, Miami Beach, Florida, on November 20, 1957, by the petitioner and states her awareness of the fact that she and Sol Simons were not on friendly terms. (R. 302)

On October 23, 1962, at the conclusion of the trial, on the predicate of the foregoing proof, the trial judge made these findings of fact:

(1) "In my opinion, the evidence is wholly and totally insufficient to destroy the presumption of correctness of the divorce decree. I think the burden is upon the person who attacks it, and I think the evidence falls remarkably short of it." (R. 208)

(2) "I discount completely and entirely the statement that Mrs. Simons made as to the friendly relationship between her and her husband, because of the letter she wrote him saying that there is no reason why he should hate her like he does. That is in Defendant's Exhibit P." (R. 208)

(3) "That exact date has not been stated, but she stated she had this conversation over the telephone with Mr. Simons about the pendency of the divorce suit, and the next day she and her sister went out to see him.

The Clerk's certificate showed that the notice was mailed from the Clerk's office on the 14th of March. Presumably, she would not have received it before the 16th, and more likely the 17th, depending upon the day of the week, and there is testimony that the man was here dictating to two people at that time." (R. 208-209)

(4) "On this, she was lulled into a false sense of security.

Her testimony does not gibe with the facts, because she has not said when it was. But she said it was a day or two after she got it.

They were dealing at arm's length. He was angry with her, because she had brought these proceedings to increase the alimony, and she had to have it done legally. But she had nothing done legally about stopping the divorce here.

> After she talked to him, she went to a man who said that the Florida divorce was no good. The attorney may have given her a false sense of security.
>
> From the evidence here, I do not think Mr. Simons did, and I discount her testimony as to their conversation. I do not think it is true." (R. 209-210)

There has never been any dispute that this cause was instituted approximately ten (10) years after the entry of the challenged divorce decree and after the death of Sol Simons. The respondent, as the executor of the last will and testament of Sol Simons, filed its answer denying the allegations of the complaint, asserting that the divorce decree and the proceedings leading up to it were lawful in all respects and affirmatively pleading that the petitioner was barred by laches. (R. 10-15).

On January 30, 1963, the trial court entered the final decree dismissing this cause with prejudice. (R. 315-316)

On appeal, the District Court of Appeal, Third District of Florida, whose decision it is that is under review in this Court, affirmed the trial court's dismissal of the cause. The essential portions of the holding of the District Court of Appeal, Third District of Florida, read as follows:

> "The wife had obtained a decree for separate maintenance with a support allowance in 1946 in New York. The husband sued for divorce in 1952 in Dade County, Florida. The wife, then a resident of New York, was served by publication, and received copies of the order for publication and the complaint. On advice of her attorney, she did not appear in the Florida divorce suit.

"The husband was granted a final decree of divorce in his Florida suit on May 1, 1952. He continued to pay support money as previously ordered by the New York court until he died in 1960. His will was filed and probated in Florida. The wife sought dower in the probate court. When her application for dower met objection on the ground that she was not his widow, having been divorced, she filed this suit in the circuit court. . . .

"By choosing not to appear in the Florida divorce suit the non-resident wife was precluded from filing suit years later to set aside the decree for matters which could have been litigated by her in defense of the divorce suit. She had due notice and opportunity to contest the husband's allegations as to his jurisdictional residence and his asserted ground of divorce. If she had defenses to those matters it was her duty to assert them in the divorce suit, and the chancellor was eminently correct in holding she was not entitled to maintain the present suit to set aside the decree for those reasons. Mabson v. Mabson, 104 Fla. 162, 140 So. 801; Bernstein v. Bernstein, 160 Fla. 654, 36 So.2d 190; MacFadden v. Muckerman, Fla. App. 1959, 116 So.2d 448. The prior New York separate maintenance decree was not a bar to a divorce suit by the husband, and his failure to disclose it in his complaint was not a fraud on the court. Matsis v. Matsis, 155 Fla. 786, 21 So.2d 545; Bernstein v. Bernstein, supra. Any affirmative defense the prior suit may have afforded should have been presented in the divorce suit. See Prall v. Prall, 58 Fla. 496, 50 So. 867, 26 L.R.A., N.S. 577; Bernstein v. Bernstein, supra; Gordon v. Gordon, Fla. 1952, 59 So.2d 40; Stone v. Stone, Fla. App. 1959, 111 So.2d 486; Taylor v. Taylor, Fla. App. 1961, 130 So.2d 115.

"The basis for the contention that the decree showed want of jurisdiction on its face was because it incorrectly recited the defendant had answered. But the record indicates the chancellor was under

no misapprehension as to nature and status of the case before him on final hearing. This is so because the master's report, which the court confirmed, showed the true situation in detail.

"The appellant's claim that the husband, in 1952 after she had notice of his divorce suit, lulled her into inaction, was properly denied by the chancellor, for her delay (Barnes v. Willis, 65 Fla. 363, 61 So. 828) and on the merits. That issue was tried before the chancellor in the instant case, in the course of which it was required that he judge the credibility of witnesses and resolve conflicts in the evidence, and his ruling thereon is adequately supported by the record."

Thereafter, a writ of certorari was sought from the Florida Supreme Court (R. 324-334), and denied (R. 335).

The petitioner then timely applied to this Court for a writ of certiorari, which was granted on October 19, 1964. (R. 336)

QUESTION PRESENTED

Petitioner, in the "Question Presented" section of her brief (pages 3-5) has predicated the issue on the following mistaken conclusions:

(a) That Sol Simons died a domiciliary of the State of New York. That factual conclusion is thoroughly erroneous. That conclusion is unhesitatingly made by the petitioner in the face of her own sworn statement to the contrary, contained in her election to take dower. She said under oath in the stated document that Sol Simons died a domiciliary of Florida.

(b) That petitioner's right to alimony under the New York separate maintenance decree is tantamount to, or the equivalent of, a widow's right to dower in Florida.

No authority whatever is cited to support that patently incorrect legal conclusion. The continued relationship of husband and wife is not necessary for the payment of alimony, although a past relationship as such is necessary. Dower, on the other hand, is a widow's right, flowing from the marital status of husband and wife at the time of the husband's death. Alimony and dower are thus entirely different in the essential element that in the former a past relationship of husband and wife is required, whereas in the latter the relationship must persist until the death of the husband.

(c) That this case was an equity action for a determination of the petitioner's property rights in the estate of Sol Simons. That is a mistaken conclusion of both law and fact. This case was an original bill in the nature of a bill of review, brought in Florida to set aside a Florida divorce decree so that petitioner could then go back to the Florida probate court and demand a dower share in the estate of a deceased Florida domiciliary, absent the legal impediment of the Florida divorce decree, which establishes that petitioner was not the widow of the Florida decedent.

(d) That the District Court of Appeal, Third District of Florida, failed to give full faith and credit to the New York separate maintenance decree providing petitioner alimony. That conclusion is erroneously stated in the face of the opinion of the aforesaid court, which does nothing of the kind. The opinion of the District Court of Appeal, Third District of Florida, merely holds, consistent with established Florida precedent, that a Florida decree which has passed into repose by virtue of the expiration of the appeal period, cannot be attacked in Florida on grounds that could and should have been asserted in the original proceeding leading up to the assailed decree. Further-

more, petitioner readily concedes that she received every cent of alimony to which she was entitled under the New York separate maintenance decree, which makes it extremely difficult to comprehend how the District Court of Appeal, Third District of Florida, could have in any way deprived her of that which she admits she received.

(e) That the petitioner was deprived of due process of law. That legal conclusion is stated by the petitioner, notwithstanding her admission that she received notice of, and had a full opportunity to defend, the Florida divorce suit, but deliberately declined to do so, as an educated decision based on advice of counsel of her own choice, to the effect that New York did not recognize Florida divorces, and that she would continue to receive her alimony notwithstanding the entry of a Florida final decree of divorce. Certainly, Florida could not, and in fact did not, deprive her of the alimony to which she was entitled under the New York separate maintenance decree. Had Florida done so, based on constructive service of process on the petitioner, its decree to that effect would have run afoul of the full faith and credit clause of the United States Constitution, as this Court held in *Estin* v. *Estin*, 334 U.S. 541, 68 S. Ct. 1213; *Armstrong* v. *Armstrong*, 350 U.S. 568, 76 S. Ct. 629; and *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416, 77 S. Ct. 1360. It is apparently the petitioner's position that because she harbors the impression that New York does not recognize and give full faith and credit to final decrees of divorce from Florida, that Florida should therefore fail to recognize its own decrees.

These mistaken assumptions make it impossible for the respondent to accept petitioner's rather unclear statement of the issue. The respondent earnestly believes that

the issue may be accurately phrased, in accordance with the record, as follows:

Whether or Not the Full Faith and Credit Clause of the United States Constitution Was Violated by the Refusal of Florida to Vacate and Set Aside Its Own Final Decree of Divorce, Which Had Aged Ten Years Since Its Rendition and Before It Was Attacked by the Petitioner, and Which Was Jurisdictionally Founded on Constructive Service of Process on a Non-resident Defendant, Where the Florida Court in the Original Divorce Proceeding Had Subject-Matter Jurisdiction of the Marital Res by Virtue of the Fact That the Plaintiff Was a Domiciliary of Florida: Because New York Had Previously Entered a Decree of Separate Maintenance Providing Alimony for the Defendant Who, with Notice of, and an Opportunity to Defend the Florida Divorce Suit, Elected to Ignore It by an Educated Decision Based on Advice of Counsel That New York Did Not Recognize Florida Divorces?

ARGUMENT

A final decree of divorce granted by a state court of the domicile of one spouse, based on constructive service of process on the other non-resident spouse, which accords procedural due process (notice and an opportunity to defend), is entitled to full faith and credit in every other state in the union, notwithstanding that the enforcement or recognition of such decree would offend the local policy of the other state. *Williams* v. *State of North Carolina*, 317 U.S. 287, 63 S. Ct. 207. In that case North Carolina, in a bigamy prosecution, refused to recognize and give effect to a Nevada divorce decree granted to a domiciliary of Nevada, based on constructive service of process on a non-resident North Carolina defendant. In reaching the ultimate conclusion it was very clearly held that a domi-

ciliary state has the power to alter and change the marital status of the spouse domiciled within its borders and that the cause of the marital rift was immaterial to and did not diminish the lawful power of the domiciliary state. The pertinent language of the holding in these particulars reads as follows:

> "Hence the decrees in this case like other divorce decrees are more than in personam judgments. They involve the marital status of the parties. Domicil creates a relationship to the state which is adequate for numerous exercises of state power.—Citations omitted—Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal. Thus it is plain that each state by virtue of its command over its domiciliaries and its large interest in the institution of marriage can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent. There is no constitutional barrier if the form and nature of the substituted service. —Citations omitted—meet the requirements of due process.—Citations omitted—Accordingly it was admitted in the Haddock case that the divorce decree though not recognized in New York was binding on both spouses in Connecticut where granted.—Citations omitted—And this Court in Maynard v. Hill, 125 U.S. 190, 8 S. Ct. 723, 31 L. Ed. 654, upheld the validity within the Territory of Oregon of a divorce decree granted by the legislature to a husband domiciled there, even though the wife resided in Ohio where the husband had deserted her. It therefore follows that, if the Nevada decrees are taken at their full face value (as they must be on the phase of the case with which we are presently concerned), they were wholly

effective to change in that state the marital status of the petitioners and each of the other spouses by the North Carolina marriages. . . .

"The existence of the power of a state to alter the marital status of its domiciliaries, as distinguished from the wisdom of its exercise, is not dependent on the underlying causes of the domestic rift. As we have said, it is dependent on the relationship which domicil creates and the pervasive control which a state has over marriage and divorce within its own borders. Atherton v. Atherton which preceded Haddock v. Haddock and Thompson v. Thompson, 226 U.S. 551, 33 S. Ct. 129, 57 L. Ed. 347, which followed it, recognized that the power of the state of the matrimonial domicil to grant a divorce from the absent spouse did not depend on whether his departure from the state was or was not justified. As stated above, we see no reason, and none has here been advanced, for making the existence of state power depend on an inquiry as to where the fault in each domestic dispute lies. And it is difficult to prick out any such line of distinction in the generality of the words of the full faith and credit clause."

This Court's ultimate conclusion was stated in these words:

"So when a court of one state acting in accord with the requirements of procedural due process alters the marital status of one domiciled in that state by granting him a divorce from his absent spouse, we cannot say its decree should be excepted from the full faith and credit clause merely because its enforcement or recognition in another state would conflict with the policy of the latter."

On the second appearance of the Williams case (*Williams* v. *State of North Carolina*, 325 U.S. 226, 65 S. Ct. 1092) this Court held, in essence, that even though a final decree of divorce awarded to a domiciliary based on con-

structive service of process on the non-resident spouse is entitled to full faith and credit throughout the nation, a finding of domicil by the court granting the divorce, although entitled to prima facie weight, is not conclusive in a sister state and can be relitigated in a sister state. It was held that "[t]his may lead, no doubt, to conflicting determinations of what judicial power is founded upon. Such conflict is inherent in the practical application of the concept of domicil in the context of our federal system." In other words, two states may rule contrarily on the factual issue of domicil. It was also held that this Court, in the exercise of its jurisdiction and duty to enforce the full faith and credit clause of the Constitution of the United States and the implementing congressional legislation thereunder, would not become a trial court of probate and divorce. That holding is written in the following words:

> "But the discharge of this duty does not make of this Court a court of probate and divorce. Neither a rational system of law nor hard practicality calls for our independent determination, in reviewing the judgment of a State court, of that rather elusive relation between person and place which establishes domicil. 'It is not for us to retry the facts,' as was held in a case in which, like the present, the jurisdiction underlying a sister-State judgment was dependent on domicil."

The primary holding was stated as follows:

> "The fact that the Nevada court found that they were domiciled there is entitled to respect, and more. The burden of undermining the verity which the Nevada decrees import rests heavily upon the assailant. But simply because the Nevada court found that it had power to award a divorce decree cannot, we have seen, foreclose re-examination by another State.

> Otherwise, as was pointed out long ago, a court's record would establish its power and the power would be proved by the record. Such circular reasoning would give one State a control over all the other States which the Full Faith and Credit Clause certainly did not confer. Thompson v. Whitman, supra. If this Court finds that proper weight was accorded to the claims of power by the court of one State in rendering a judgment the validity of which is pleaded in defense in another State, that the burden of overcoming such respect by disproof of the substratum of fact—here domicil—on which such power alone can rest was properly charged against the party challenging the legitimacy of the judgment, that such issue of fact was left for fair determination by appropriate procedure, and that a finding adverse to the necessary foundation for any valid sister-State judgment was amply supported in evidence, we cannot upset the judgment before us."

Petitioner, on page 29 of her brief, states that "[h]ere we have a case that certainly goes beyond any of the reported decisions by this Court on the subject matter", and the respondent fully agrees with that statement, because petitioner would have this Court hold that Florida, under full faith and credit, should disregard its own decrees. This is not a case within the permissible reach of Williams II, where a final decree of one state is attacked in the courts of a sister state which can inquire into the jurisdictional predicate of the final decree rendered elsewhere. This is an attack in Florida on a Florida final decree of divorce, awarded to a party found by Florida to be a domiciliary of Florida, based on constructive service of process on the non-resident spouse who was admittedly accorded procedural due process of law. The Florida court rendering the divorce decree in 1952 found that the plaintiff, Sol Simons, was a domiciliary of Florida. (R. 226

and 237) Consequently, under the authority of Williams I, Florida had the power to lawfully award Sol Simons (its domiciliary) a divorce. The petitioner failed to appear in Florida and contest the divorce suit. Her failure to do so was not a result of any alleged fraud. The trial court in this case tried that issue of fact and, on the basis of conflicting proof, found the petitioner's charges of fraud were untrue. The chancellor said "I do not think it is true." (R. 210) Petitioner's failure to appear in Florida was based on her primary concern for the preservation of the right to continue to receive the alimony awarded to her by the prior New York separate maintenance decree. She was advised by an attorney of her own choice that New York did not recognize Florida divorces (which is, of course, contrary to Williams I), and that she would continue to be entitled to her alimony under the New York decree notwithstanding the entry of a Florida final decree of divorce. The attack, therefore, in Florida, on its own final decree ten years after rendition, must be and is governed by the law of Florida in regard to the permissible scope of such an attack.

It has been settled beyond debate in Florida that a final decree of divorce that has become absolute by the passage of that period of time allowed for the taking of an appeal, cannot be assailed other than by an original bill in the nature of a bill of review, brought in the court of rendition, based upon extrinsic, as opposed to intrinsic, fraud. *Hamilton* v. *Flowers,* 134 Fla. 328, 183 So. 811; *Golden Gate Development Co.* v. *Ritchie,* 140 Fla. 103, 191 So. 202; and *Macfadden* v. *Muckerman,* 116 So.2d 448 (Fla. App. 3rd 1959). In the *Hamilton* case (*supra*), the pertinent language of the holding reads as follows (183 So. at 816):

> "If it be considered as an original bill to attack on the ground of fraud a final decree, valid on its face, and whch has become final and absolute, the bill must allege facts which would show extrinsic fraud in the procurement of the decree."

The pertinent language of the holding in the *Ritchie* case (*supra*), reads thusly (191 So. at 203):

> "Bills of review and original bills in the nature of bills of review are controlled largely by the same general principles. See Andrew v. Hecker, 132 Fla. 759, 182 So. 251. Bills of review are required to be filed within the six months' period allowed by the statute in which to take appeals and may be maintained because of matters discovered after entry of final decree and were not available for presentation to the court prior to the decree. See Shaw v. Hamm, 133 Fla. 722, 183 So. 19. Original bills in the nature of bills of review brought for the purpose of impeaching a final decree are addressed largely to the sound discretion of the court and can be permitted or allowed without leave of the court. It is usually considered as a new suit and its objective is to impeach a final decree obtained by fraud or some other equitable reason.—Citations omitted."

The complaint in the *Macfadden* case (*supra*), was a bill in the nature of a bill of review brought thirteen (13) years after the entry of a final decree of divorce on January 9, 1946, rendered by the Dade County Circuit Court seeking to set aside that decree on the ground that the bona fides of residence of the original plaintiff were false and fraudulent. At the time suit was started, the original plaintiff was dead. The court held that the complaint failed to state a cause of action since residence (domicile) was an issue in the original proceeding and could have been litigated there and then and any claim of fraud in

that regard was intrinsic as opposed to extrinsic fraud. The pertinent language of the holding reads as follows (116 So.2d at 448-449):

> "Plaintiff has appealed from an order dismissing a bill of complaint in the nature of a bill of review to set aside a decree of divorce entered in the Circuit Court of Dade County, Florida, on January 9, 1946. The order dismissed the cause with prejudice and without leave to amend.
>
> * * *
>
> ". . . In the case at bar, the appellant seeks to collaterally attack the decree some thirteen years after its rendition upon grounds which constitute intrinsic rather than extrinsic fraud. The rule is and has been that those issues that could or have been litigated in the proceedings themselves are not sufficient grounds to collaterally attack a decree which otherwise appears to be valid on its face.—Citations omitted—As opposed to intrinsic fraud, the bill of complaint does not, in our opinion, allege facts which would constitute extrinsic fraud such as the deceased husband's fraudulently keeping the appellant from defending the action, keeping her in ignorance of the proceedings, or other misconduct that would deprive the wife of an opportunity to have defended the action. . . ."

It is a permanent part of the jurisprudential panorama of Florida that a spouse served constructively with process in divorce litigation may not ignore that process with impunity and, after a decree for divorce is entered and becomes absolute by the passage of the time allowed for taking appeals, relitigate those issues which could have been raised in the original proceeding. This is merely another way of saying that a final decree may not be challenged for intrinsic elements after the time for taking an appeal has expired. In *Mabson* v. *Mabson*, 104 Fla. 162, 140 So. 801, a husband instituted suit for divorce

and served the defendant-wife constructively. She had left him to take up residence in New York. She admitted that she received the notice of suit but contended that it was defective because the return day was twenty-seven (27) days instead of twenty-eight (28) days from the date of the first publication of notice. The wife failed to exhibit her original bill in the nature of a bill of review raising the objection until several years after the decree had been rendered. In the meantime, she litigated in New York, based on personal service on the husband, the question of alimony. It appears that when the wife received the notice of the Florida divorce proceeding she discussed it with her lawyer in New York and apparently decided to ignore the Florida proceeding. This is a strikingly similar circumstance to what occurred in the instant case. The rule enunciated in that case is best expressed in the language of the Florida Supreme Court, contained in its syllabus under note six, which reads as follows (140 So. at 801):

> "6. Where the defendant is actually served with process which may be defective in form, or subject to the objections that may be waived by the defendant, the defendant cannot with impunity ignore the actual service of the kind of notice which he has received, but must ordinarily submit his objections in this regard to the court from which the process issued, in order to take advantage of them."

Mabson stands for the proposition that an original bill in the nature of a bill of review will not lie to protest procedural defects where notice is received but ignored. Moreover, Mabson is significant because it establishes that notice plus intentional disregard of pending proceedings constitutes an estoppel against an original bill in the nature of a bill of review to vacate a final decree of divorce.

The pertinent language of the court's holding in that respect reads thusly (140 So. at 805-806):

> "Without adjudicating the legal effect of the publication as made of the process in the divorce suit against the complainant in this cause, she should not be permitted to maintain this suit because of her conduct. It appears from the complainant's bill in the nature of a bill of review that she received from the clerk of the court, under the statute, notice of the pendency of the divorce suit against her and had reasonable opportunity to present therein her defenses and claims for alimony, but intentionally refrained from asserting her rights in the Florida court and proceeded with her suit in the courts of New York, which courts held that her claims should have been presented to the courts of Florida. Under such circumstances, equity will not entertain a bill in the nature of a bill of review brought by the complainant to challenge the validity of a decree entered by the Florida court in a divorce suit against complainant, of which she had notice and an opportunity to be heard, but intentionally omitted to assert her claims as to matters now sought to be presented for adjudication."

In the case of *Matsis* v. *Matsis*, 155 Fla. 786, 21 So.2d 545, the Florida Supreme Court held that a wife who intentionally refrained from contesting a divorce suit in Florida after having received notice could not maintain an original bill in the nature of a bill of review to set aside the final decree of divorce nine (9) months after its rendition on the following grounds: (a) that the husband committed fraud by concealing and not alleging his prior unsuccessful divorce litigation in New Hampshire based on the same grounds asserted for divorce in Florida, and in which proceeding New Hampshire entered a separate maintenance decree providing the wife with alimony, and

(b) that the grounds for divorce were insufficient and uncorroborated. The significance of the Matsis case is twofold: (1) it establishes that neither failure by a husband to allege his prior unsuccessful marital litigation based on the same grounds nor insufficiency of the proof to establish such grounds for divorce are appropriate grounds for an original bill in the nature of a bill of review to set aside a final decree of divorce; and, (2) that a wife who received notice of the proceeding but refrained from contesting the case is estopped to assail the final decree after the expiration of the appeal period. The pertinent language of the Florida Supreme Court's holding reads as follows (21 So.2d at 546):

> "It is our view that there is no equity in the bill, and that the motion to dismiss should have been granted. The allegations of the bill of complaint show not fraud but an attempt by the wife to relitigate issues which should have been presented in the original suit and which have been foreclosed by the entry of the final decree and the lapse of the statutory time within which to take an appeal. If the decree entered in the New Hampshire court did in fact constitute a bar to any subsequent suit by the husband on the same issues, it was Mrs. Matsis' duty to assert such defense in the original suit in timely manner, if she cared to avail herself of such defense. See Harrison v. Harrison, 19 Ala. 499. If the evidence offered by Mr. Matsis to sustain his bill was insufficient, the place to have made the objection was in the original suit; there being at least some evidence offered by the plaintiff in the original suit to prove his cause of action. Having intentionally refrained from asserting her defenses or contesting the issues in a suit of which she had due and legal notice and an opportunity to be heard, Mrs. Matsis may not now be heard to question the final decree in this collateral proceeding instituted after the time for appeal has expired.—(Citations omitted)—"

It will be observed that the court noted that the prior marital litigation was defensive and should have been alleged and proven by the wife in the original proceeding. To the same effect are the cases of *Coleman* v. *Coleman*, 157 Fla. 515, 26 So.2d 445, and *Bernstein* v. *Bernstein*, 160 Fla. 654, 36 So.2d 190. In the Bernstein case the following was stated (36 So.2d at 191):

> "The suit for support and maintenance is not a bar to a suit for divorce.—(Citation omitted)—It may be expedient in a hill for divorce to recite the fact of proceedings in a foreign court for support and maintenance if they are in case, but that is not essential to the sufficiency of the bill for divorce. Such proceedings are matters of defense and the chancellor is at liberty to deal with them as the circumstances may seem meet since he has acquired jurisdiction of the plaintiff."

In *Masilotti* v. *Masilotti*, 158 Fla. 663, 29 So.2d 872, the divorced wife brought suit after the final decree became absolute and after the original plaintiff was dead alleging that she had been induced not to resist the divorce and to enter into a property settlement agreement by a threat of abandonment. Admittedly, she had notice of the divorce proceeding. The complaint was dismissed in the Circuit Court and the Florida Supreme Court affirmed, pointing out in conclusion that the original plaintiff was dead and the suit brought challenging the decree was foreclosed because it was instituted after a lengthy lapse of time, which, interpolating the facts recited in the opinion was about two (2) years after the rendition of the decree. The holding of the chancellor, quoted with approval by the Florida Supreme Court, in part reads as follows (29 So.2d at 873):

> "'It is abundantly clear that she had notice of the suit long prior to its conclusion and, in fact, states

in her bill of complaint that she believed "that the decree against her would follow as a matter of course in the absence of opposition by her."

In the case of Matsis v. Matsis, 155 Fla. 786, 21 So.2d 545, it was said:

> 'Where wife intentionally refrained from contesting issues in divorce suit of which she had due notice and an opportunity to be heard, wife could not question final decree by bill in nature of bill of review * * *.'"

Another case in point both legally and factually is *Barnes* v. *Willis,* 65 Fla. 363, 61 So. 828. That case represents a wife's attack upon an eleven (11) year old divorce decree subsequent to the death of the original plaintiff-husband. The thrust of the wife's assault against the decree was that the husband, shortly after the divorce suit was begun, told her it would be dismissed and she need not defend. The Florida Supreme Court held that acquiescence for eleven (11) years and until after the original plaintiff-husband was dead, constituted an estoppel. The pertinent language of the holding reads as follows (61 So. at 829):

> ". . . she willingly acquiesced in the proceedings and in the divorce decree obtained in 1900, . . . and she did not institute proceedings to annul the divorce decree until 1911. This delay and conduct estop her from complaining."

In the instant case, the now complaining wife was duly served and had notice of the Florida divorce proceeding but chose to ignore those proceedings for almost ten (10) years and until after the original plaintiff-husband was dead. All of the grounds urged by the petitioner to set aside the old divorce decree constitute a challenge upon intrinsic matters which could have been

litigated in the original proceeding except for the ground based on the alleged statement made by the now deceased original plaintiff that the suit would be dismissed. That ground is a factual figment of the petitioner's imagination corroborated by her all too eager sister. The proof established that Sol Simons was nowhere near where plaintiff claims he was when they had the supposed conversation. The proof established that he was in Florida when she claimed he was in New York. The evidence was conflicting. The chancellor resolved the conflict against the petitioner which precludes further consideration. The citation of authority is surely unnecessary to support the principle that appellate courts do not substitute their version of the facts for that of the chancellor. Additionally, it appears from the authorities cited that the petitioner, having had notice of the divorce proceedings and having allowed ten (10) years to elapse and instituting this proceeding after the death of the husband, is estopped by silence and barred by laches. It is indeed easy to make a charge against a person whose lips are sealed by death. Petitioner knowingly accepted the status of being divorced so long as she received her alimony payments. It is patently clear that in Florida petitioner is validly divorced and barred from attacking the final divorce decree.

Before leaving Florida law it is incidentally important to take cognizance of that line of Florida cases which hold that a decree of a sister state must be pleaded and proven and that its res adjudicata or estoppel by judgment effect, under full faith and credit, must be decided after careful judicial scrutiny. If the causes of action are identical, then the prior judgment of the sister state, by virtue of full faith and credit, is res adjudicata. However, if the causes of action are not identical, then it is, by virtue of

full faith and credit, only an estoppel by judgment of the facts that were previously litigated and actually adjudicated by the court in the sister state. See *Bagwell* v. *Bagwell*, 153 Fla. 471, 14 So.2d 841; *Gordon* v. *Gordon*, 160 Fla. 838, 36 So.2d 774, 59 So.2d 40 (1952, Fla.), *cert denied*, 344 U.S. 878, 73 S. Ct. 165; *Berman* v. *Berman*, 103 So.2d 611 (1958, Fla.); *Reynolds* v. *Reynolds*, 117 So.2d 16 (Fla. App. 1st, 1959); and *Katz* v. *Katz*, 159 So.2d 241 (Fla. App. 3rd, 1964), *cert. denied*, 166 So.2d 594 (1964, Fla.), *cert. denied*, ... U.S. ....., 85 S. Ct. 276. The significance of these cases is that they constitute the line of authority espousing the legal principles that would have governed had the petitioner appeared in the Florida divorce suit in 1952 and affirmatively alleged the defense of res adjudicata by reason of the New York separate maintenance decree. The burden of pleading and proof would have been hers and no one can crystal-ball gaze and predict the result. As this Court held in Williams II "[i]t is not for us to re-try the facts." The petitioner had notice and an opportunity to raise the now alleged affirmative defense of res adjudicata. Universally, affirmative defenses not raised are waived. Surely, after all of these many years and the intervening death of Sol Simons, the petitioner cannot either reasonably expect to or reasonably be permitted to resurrect defenses that she voluntarily abandoned a decade ago.

The petitioner urges that this case is controlled by the so-called trilogy of opinions of this Court in the cases of *Estin* v. *Estin*, 334 U.S. 541, 68 S. Ct. 1213; *Armstrong* v. *Armstrong*, 350 U.S. 568, 76 S. Ct. 629; and *Vanderbilt* v. *Vanderbilt*, 354 U.S. 416, 77 S. Ct. 1360. These cases are in point but afford petitioner no solace. They establish what has become commonly called the divisible divorce concept. That concept recognizes that the courts of the

domiciliary state of one spouse may lawfully grant a divorce and thereby alter and change the marital status of the parties either before or after the courts of a sister state have adjudicated the wife's right to alimony based on personal service of process. In *Estin* v. *Estin, supra,* the parties were married in 1937 and lived together in New York until 1942, when the husband left the wife. In 1943, the wife started an action in New York against the husband for separate maintenance and that court found that the husband had abandoned the wife and awarded her $180 per month permanent alimony. In 1944, the husband went to Nevada and started a divorce suit there. The non-resident wife was served constructively but did not appear. The Nevada court granted the husband an absolute divorce on the ground of three years continual separation without cohabitation. The Nevada decree made no provision for alimony. After entry of the Nevada divorce decree the husband stopped paying the alimony provided for in the New York decree. The wife sued in New York for a judgment for the alimony arrearage. The husband appeared and sought to have the alimony provision of the New York decree stricken by reason of the Nevada decree. The New York courts all denied the relief sought by the husband. This Court granted the husband's petition for a writ of certiorari and after consideration of the merits affirmed the courts below. On the turnpike to the result, this Court held that a domiciliary state had the power to change the status of the spouse living within its territory, as follows:

> "Marital status involves the regularity and integrity of the marriage relation. . . . The interest of the State extends to its domiciliaries. The State should have the power to guard its interest in them by changing or altering their marital status and by protecting them in that changed status throughout the farthest

reaches of the nation. . . . These are matters of legitimate concern to the State of the domicile. They entitle the State of the domicile to bring in the absent spouse through constructive service. In no other way could the State of the domicile have and maintain effective control of the marital status of its domiciliaries.

"Those are the considerations that have long permitted the State of the matrimonial domicile to change the marital status of the parties by an ex parte divorce proceeding, Thompson v. Thompson, 226 U.S. 551, 33 S. Ct. 129, 57 L. Ed. 347, considerations which in the Williams cases we thought were equally applicable to any State in which one spouse had established a bona fide domicile."

Further along the road to the result this Court held that the state where the wife resides and which has previously adjudicated her right to alimony, was rightfully concerned that such alimony continue lest the wife become a public charge. The result was stated as follows:

"The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New York in this broken marriage by restricting each State to the matters of her dominant concern."

Mr. Justice Frankfurter's dissent emphasizes the impact of the Court's decision by stating:

"Nevada merely established a change in status. It was for New York to determine the effect, with reference to its own law, of that change in status. If it was the law of New York that divorce put an end to its separate maintenance decree, the respondent's decree would have been terminated not by the Nevada

divorce but by the consequences, under the New York law, of a change in status, even though brought about by Nevada. Similarly, Nevada could not adjudicate rights in New York realty, but, if New York law provided for dower, a Nevada divorce might or might not terminate a dower interest in New York realty depending on whether or not New York treated dower rights as extinguished by divorce."

In the *Armstrong* case, *supra*, a Florida domiciliary obtained a Florida divorce from his wife, who had separated from him and who took up residence in Ohio. The wife was served constructively in the Florida divorce proceeding and did not appear. The Florida divorce purportedly adjudicated that the wife was not entitled to alimony. Subsequently, the wife instituted suit in Ohio for divorce and alimony. The Ohio court denied the wife a divorce, even though she proved grounds for a divorce, because Florida had previously decreed a divorce between the parties which effectively changed their status; but provided the wife with permanent alimony. The question presented was whether Ohio denied full faith and credit to the Florida divorce decree which purportedly adjudicated and denied the wife the right to alimony. The majority opinion appears to have side-stepped the issue by holding that the Florida court did not mean what it said, because it had no power to deprive the wife of alimony in an ex parte divorce proceeding. The concurring opinion of Mr. Justice Frankfurter encouragingly establishes that a writ of certiorari may be improvidently issued on preliminary examination. He said:

> "On my study of the record I would dismiss the writ as improvidently granted. . . . The inevitably cursory consideration that is normally given in a case on the preliminary round precludes the assumption that a tentative finding of a federal question will survive the thorough study of the record which consid-

eration of a case on the merits implies. Therefore, it is that cases have again and again been dismissed for want of jurisdiction, i.e., a substantial federal question was found wanting; on the contrary, it became clear that the state court judgment rested on an adequate state ground. . . .

"The Court not infrequently is required to find its way through a tangled or confused record in order to determine whether a state court judgment turned on a state ground or on a federal ground. In short, the Court has jurisdiction to decide whether it has jurisdiction. But when adequate analysis discloses that a state judgment amply rests on a state ground, we are barred from proceeding to the merits of the alleged federal question. The appropriate disposition is to dismiss the case for want of jurisdiction."

The concurring opinion of Mr. Justice Black, joined in by The Chief Justice and Mr. Justices Douglas and Clark, is enlightening and indeed establishes the respondent's position in this case. It was stated:

"There was nothing novel in our holding in Estin v. Estin that a State where one of the parties to a marriage is domiciled can dissolve the marriage without personal service but that it cannot render a personal decree granting or denying alimony. The distinction between a decree which grants a divorce and one which grants a personal money judgment was recognized and the reasons for the distinction were stated by this Court in Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565. The state courts have long recognized the rule that a court lacking personal jurisdiction over a husband cannot render a valid alimony judgment against him. We see no reason why a court lacking personal jurisdiction over a wife should be allowed to render a valid judgment denying alimony to her. Personal jurisdiction is as necessary to protect a wife's interests as it is to protect a husband's."

In the *Vanderbilt* case, *supra*, the husband obtained an ex parte divorce in Nevada. The wife then sued for alimony in New York. The husband appeared in New York and urged the denial of alimony by reason of the full faith and credit that must be accorded to the Nevada divorce decree. Once again this Court held that the divorce decree, though valid and entitled to full faith and credit, could not, without personal service of process on the defendant, terminate the right to alimony. Mr. Justice Frankfurter's dissent takes the position that full faith and credit requires, not just a recognition of the power of the domiciliary state of one of the spouses to sever the bonds of matrimony, but also the power to terminate the right to alimony as well. The dissent of Mr. Justice Harlan, standing on the foundation of Williams I, takes the position that an ex parte divorce granted by a domiciliary state of one of the spouses, must be recognized as severing the bonds of matrimony and changing the marital status of the parties; but that its actual effect outside the domiciliary state of the spouse obtaining the divorce, is a question that should be left, not to every other state, but only to the domiciliary state of the wife at the time the divorce was granted. The idea was to prevent wives, after an ex parte divorce, from becoming migratory alimony huntresses. In the circumstances, Mr. Justice Harlan determined, in his dissent, that the ex parte Nevada divorce, given full faith and credit, precluded New York from awarding alimony to the wife.

No matter how these cases are taken, from majority opinions, concurring opinions or dissents, the petitioner's position in this case finds not a whisper of support. The circumstances existing between Sol Simons and the petitioner, after the Florida divorce decree was entered in 1952, and until his death in 1960, were in strict accord-

ance with these authorities. The parties were divorced by virtue of the Florida divorce decree, which changed their marital status. The petitioner continued to receive her alimony payments pursuant to the New York decree until Sol Simons died. The interest of Florida in changing the status of its domiciliary (Sol Simons) was satisfied and the interest of New York in its domiciliary (the petitioner) not being left pauperized and a public charge was similarly satisfied. Florida made no attempt, as was the case in Armstrong and Vanderbilt, to deny the nonresident wife alimony. Petitioner's New York alimony decree remained wholly undisturbed and totally honored throughout the life of Sol Simons. What the petitioner is truly asking this Court to do is to extend the New York alimony decree beyond its own scope and transpose it into a dower share in a Florida estate of a deceased Florida domiciliary who had been validly divorced in Florida. Translated into the context of a constitutional proposition, it means that the domiciliary state that validly granted a divorce in 1952, should not give its own decree full faith and credit. Perhaps petitioner wants some obscure and unrevealed New York law in regard to dower to have an extraterritorial effect in Florida in regard to a Florida domiciliary's estate, which is composed entirely or personalty located in Florida. Petitioner would have the local law of New York govern matters of status of Florida domiciliaries and Florida property. This unusual proposition is evidently based on the legal advice that the petitioner received back in 1952 that New York does not recognize Florida divorces. Florida did not fail to give full faith and credit to the New York separate maintenance decree. However, it appears that Florida is expected to give no credit to its own decree because some members of the bar of New York appear to think little of the juris-

prudence of Florida. This case presents a splendid opportunity for this Court to let everyone know that the states of this union are of equal dignity. Petitioner has clearly twisted and distorted the divisible divorce concept thoroughly out of recognition.

Regarding dower, this Court held in *Ferry* v. *Spokane, P. & S. Ry. Co.*, 258 U.S. 314, 42 S. Ct. 358, as follows:

> "Dower is not a privilege or immunity of citizenship, either state or federal, within the meaning of the provisions relied on. At most it is a right which, while it exists, is attached to the marital contract or relation, and it always has been deemed subject to regulation by each state as respects property within its limits."

Inchoate dower is given birth in marriage and dies in divorce. For dower to become consummate a man must die married. The interposition of divorce between marriage and death terminates dower. Among the numerous fallacies in petitioner's argument is the underlying one that blatantly overlooks the simple factor that an adjudication of a wife's right to alimony and the payment thereof does not require the continued relationship of husband and wife. In fact, most times in divorce suits the final decree severs the bonds of matrimony, terminates all incidents of the relationship of husband and wife, including inchoate dower; but specifically provides for permanent alimony to be paid until the death of either of the parties or the earlier remarriage of the wife. Unquestionably, under the divisible divorce concept, the right to receive alimony is in no wise dependent on the continued relationship of husband and wife, which can be severed by the domiciliary state of one spouse on the foundation of constructive service of process. However, can the divisible divorce concept be logically expanded from ali-

mony to dower, so that a man can be validly divorced and the marital status altered, but the right to dower preserved? If that is possible, and a dower share is a third of a man's estate, then all he needs is three ex parte divorces, and he has no estate left to dispose of. Carried slightly further, if he married again and had a fourth wife, only God knows what would happen then. Moreover, one wonders what will happen to the banks and title companies in this country who have, as a commonly known standard practice, passed titles on the basis that a valid constructive service divorce terminates dower. If this Court were to expand the divisible divorce concept to allow the petitioner's claim, it seems to follow, like the day the night, that there will be both a vast number of clouded titles and suicides in the banking and title insurance industries in this nation. It seems obvious that there is no question that once the domiciliary state in a constructive service divorce proceeding grants a divorce to its domiciliary and thereby changes the marital status of the parties, that such change carries with it the effect given by the law of the domiciliary state. That is really what this case is all about. In Florida, divorce terminates dower. The following appears in 11 Fla. Jur., *Dower*, Sec. 15, at page 46:

> "A final decree of divorce puts an end to a wife's right of dower and is a complete defense to any claim for dower at the death of the husband. This is true regardless of which spouse secures the divorce. This rule rests on the evident fact that when the marriage relation is terminated by divorce, the woman ceases to be the wife of the man and on his death does not become his widow."

The Florida Supreme Court, in *Bowler* v. *Bowler*, 159 Fla. 447, 31 So.2d 751, held:

> "Dower rights in this State are controlled by statute and do not become vested until the death of the husband, leaving the wife surviving him. Bennett v. Bennett, Fla., 26 So.2d 650. It is also settled that dower rights, being inchoate, are also extinguished by divorce decreed at the instance of either parties.
>
> North v. Ringling, 149 Fla. 739, 7 So.2d 476."

The precise questions of whether dower is terminated in Florida by a Florida divorce decree based on constructive service of process was affirmatively answered in *North* v. *Ringling*, 149 Fla. 739, 7 So.2d 476. The divorce decree involved in that case was based on constructive process. (See *Ringling* v. *Ringling*, 117 Fla. 423, 158 So. 125) After the husband's death the wife sought to set aside the final decree of divorce by the vehicle of a bill in the nature of a bill of review in order to clear the way for a dower claim against the dead former husband's estate. Which is exactly what the petitioner seeks to do. The pertinent language of the Florida Supreme Court's holding that dower had been terminated by the divorce decree based on constructive service reads as follows (7 So.2d at 481):

> "In the absence of statute saving it a final decree of divorce puts an end to the wife's right of dower and is a complete defense to any claim for dower at the death of the husband. This is true regardless of which spouse secures the divorce. In the case at bar, no claim for dower was asserted at the time of the final decree of divorce, nor was it ever mentioned until after the death of John Ringling. It is now attempted to be reached by bill in the nature of a bill of review."

Hence, Florida law is settled and clear that divorce ends dower. Sol Simons and the petitioner were divorced in

1952, and her claim to dower in Florida is thoroughly without merit.

Before closing, one additional feature of this case should be explored. It is evident that petitioner seeks to extend the obligation of Sol Simons to pay her alimony by virtue of the New York separate maintenance decree as a charge against his Florida estate in the form of a claim for a dower share. In addition to the other reasons establishing the invalidity of that contention, alimony does not persist past the death of the husband. Petitioner mistakenly cited *Aldrich* v. *Aldrich*, 163 So.2d 276 (1964, Fla.) for the rule that an alimony award in a divorce decree for the lifetime of the former wife is a charge upon the estate of the husband. No doubt, unpaid alimony accruing up to the time of the death of the former husband is a charge upon his estate. But that is not what the Aldrich case is about. The Florida Supreme Court decided that case on a certification of questions of Florida law from this Court. *Aldrich* v. *Aldrich*, 375 U.S. 75, 84 S. Ct. 184; 375 U.S. 249, 84 S. Ct. 305. The case arose in West Virginia. The parties had been divorced in Florida. The Florida divorce decree provided for alimony to be paid after the husband's death as a charge against his estate. The husband died a resident of West Virginia, where his estate was probated. The former wife filed a claim against his estate for continued alimony. The West Virginia courts held that the Florida divorce decree, as to alimony after the death of the husband, was erroneous and therefore not entitled to full faith and credit. The Florida Supreme Court, in response to this Court's certification of questions, answered that alimony did not persist after the death of the husband in the absence of statute (which Florida has not enacted), or agreement. The Florida divorce decree was thus held erroneous, but due to the

elapse of the appeal period (the decree not having been appealed) it passed into verity and was unassailable in Florida. This Court, upon the Florida Supreme Court's statement of Florida law, reversed the West Virginia decision and held that even though erroneous, a decree of a sister state, which has passed into verity by virtue of the elapse of the appeal period, must be accorded full faith and credit. *Aldrich* v. *Aldrich*, 378 U.S. 540, 84 S. Ct. 1687. In regard to alimony after death the Florida Supreme Court previously held, in *Underwood* v. *Underwood*, 64 So. 2d 281, 288 (1953, Fla.):

> "... By its very nature alimony is limited to the lifetime of the husband."

New York has similarly decided the issue that alimony does not persist past the death of the husband. *Daggett* v. *Commissioner*, 128 F.2d 568 (9th Cir. 1942), *cert denied*, 317 U.S. 673, 63 S. Ct. 78; *Wilson* v. *Hinman*, 182 N.W. 408, 75 N.E. 236; *Barnes* v. *Klug*, 129 App. Div. 192, 113 N.Y.S. 325; *Re Golding*, 127 Misc. 821, 216 N.Y.S. 593; *Re Schnirman*, 167 Misc. 809, 4 N.Y.S. 2d 800; *Re Van Arsdale's Will*, 190 Misc. 968, 75 N.Y.S. 2d 487; *Re Baratta's Estate*, 199 Misc. 246, 192 N.Y.S. 2d 766, *affd.*, 279 App. Div. 992, 112 N.Y.S. 2d 493; and *Re Grimley's Estate*, 200 Misc. 901, 107 N.Y.S. 2d 129. Consequently, petitioner seeks to extend the effect of her New York alimony decree in Florida beyond the limits permissible either in New York or in Florida.

CONCLUSION

Florida granted a valid divorce based on constructive service of process to Sol Simons, a domiciliary of Florida, which changed the marital status of the parties from mar-

ried to single or divorced, and never in any way at all either attempted to, or did it interefere with the prior New York separate maintenance decree providing alimony to petitioner. Sol Simons honored to his death the New York alimony award. He died a domiciliary of Florida, leaving nothing but personal property located in Florida. Petitioner's claim to dower in Florida is defeated by the valid Florida divorce decree and the law of Florida as to the effect that divorce ends dower. Florida did nothing more than give its own decree recognition. There has never been a denial of full faith and credit in Florida of the New York alimony decree, the efficacy of which terminated both in New York and Florida at the death of Sol Simons. Perhaps New York discriminates against Florida decrees, but Florida has not discriminated against the New York decree. It is indeed time, long past due at that for Florida to be considered by all as a member of the union, and her decrees honored as she honors those of all other states.

Wherefore, the respondent respectfully prays that the writ of certiorari heretofore granted in this cause on the 19th day of October, 1964, be quashed as improvidently issued or, in the alternative, the decision of the District Court of Appeal, Third District of Florida, be affirmed.

Respectfully submitted,

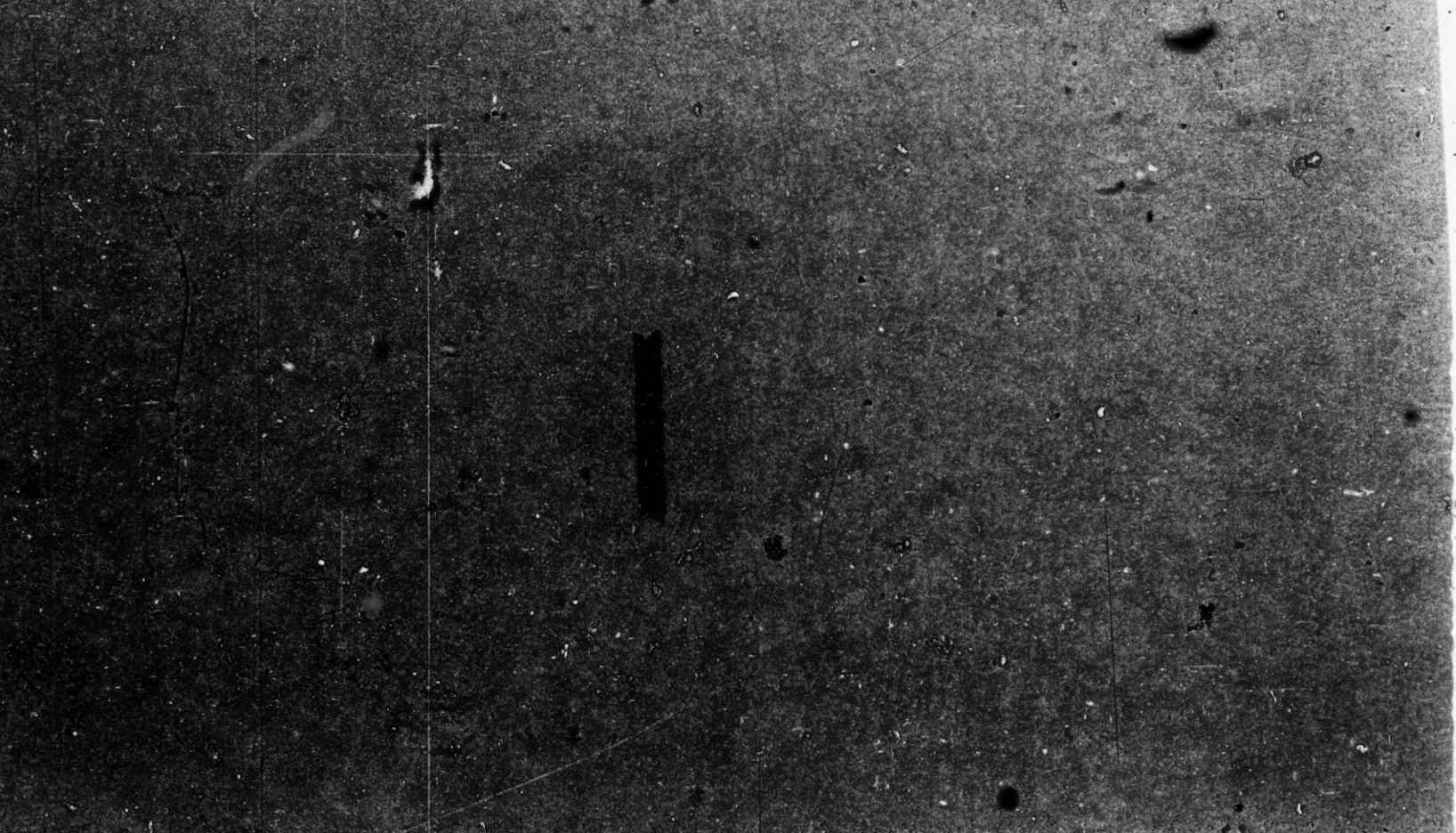
MARION E. SIBLEY

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CERTIFICATE OF SERVICE

The undersigned certifies that three (3) true and correct copies of the above and foregoing Brief for Respondent on the Merits were furnished, by mail, by depositing same in a United States mail box, with first class postage prepaid, addressed to counsel of record for the petitioner, William Gresham Ward, 1240 DuPont Building, Miami, Florida 33131, on this 22nd day of February, 1965.

IRVING B. LEVENSON



APPENDIX

1. § 731.35(1), Florida Statutes, 1959:

"731.35 Election To Take Dower.—

"(1) In order to take dower, a widow must so elect by an instrument in writing, signed by her and acknowledged or sworn to by her before any officer authorized to take acknowledgments or to administer oaths, and filed, within nine months after the first publication of the notice to creditors, in the office of the county judge in whose court the estate of the deceased husband is being administered. The county judge shall record all elections to take dower."

2. § 65.01, Florida Statutes, 1951:

"65.01, Divorce To Be By Bill In Equity.—Suits for divorce shall in all cases be by bill in equity."

3. § 65.02, Florida Statutes, 1951:

"65.02 Residence Required.—In order to obtain a divorce the complainant must have resided ninety days in the State of Florida before the filing of the bill of complaint."

4. § 65.03, Florida Statutes, 1951:

"65.03 All Divorces To Be A Vinculo.—No divorce shall be from bed and board, but every divorce shall be from bonds of matrimony."

5. § 65.04, Florida Statutes, 1951:

"65.04 Grounds for Divorce.—No divorce shall be granted unless one of the following facts shall appear:

"(1) That the parties are within the degrees prohibited by law.

"(2) That the defendant is naturally impotent.

"(3) That the defendant has been guilty of adultery.

"If it shall appear to the court that the adultery complained of was occasioned by collusion of the parties, and done with the intent to procure a divorce, or that both parties have been guilty of adultery, no divorce shall be decreed.

"(4) Extreme cruelty by defendant to complainant.

"(5) Habitual indulgence by defendant in violent and ungovernable temper.

"(6) Habitual intemperance of defendant.

"(7) Willful, obstinate and continued desertion of complainant by defendant for one year.

"(8) That the defendant has obtained a divorce from the complainant in any other state or country.

"(9) That either party had a husband or wife living at the time of the marriage sought to be annulled."

6. § 65.06, Florida Statutes, 1951:

"65.06 Proceedings against Nonresident Defendants.—Bills for divorce may be brought against defendants residing out of the state, and service shall be effected upon them as in other cases in chancery."

7. § 48.01 (4), Florida Statutes, 1951:

"48.01 Service of Process by Publication, In What Cases.—Service of process by publication may be had, in any of the several courts of this state, and upon any of the parties mentioned in § 48.02 in any suit or proceeding:

"(4) For divorce or annullment of marriage;".

8. § 48.02 (1), Florida Statutes, 1951:

"48.02 Service Of Process By Publication, Upon Whom.—Where personal service of process cannot be had, service of process by publication may be had upon any party, natural or corporate, known or unknown, including:

"(1) Any known - - - natural person, - - -."

9. §48.03, Florida Statutes, 1951:

"48.03 Sworn Statement As Condition Precedent.—

"(1) As a condition precedent to service by publication, there shall be filed in the cause a statement executed by the plaintiff, his agent or attorney, setting forth substantially the matters hereafter required, which statement may be contained in the initial or other pleading, if sworn to, or in any affidavit or other sworn statement.

"(2) The word 'plaintiff' as used in this chapter shall extend to any party in the cause who may be entitled to service of original process upon any party to the cause or any person who may be brought in or allowed to come in as a party by any lawful means.

"(3) After the entry of a final judgment or decree in any cause no sworn statement shall ever be held defective for failure to state a required fact if the said fact otherwise appears from the record of the cause."

10. §48.04, Florida Statutes, 1951:

"48.04 Sworn Statement, Natural Person as Defendant.—The sworn statement of the plaintiff, his agent or attorney, for service of process by publication against a natural person, shall show:

"(1) That diligent search and inquiry have been made to discover the name and residence of such person, and that the same is set forth in said sworn statement as particularly as is known to the affiant; and,

"(2) Whether such person is over or under the age of twenty-one years, if his age is known, or that his age is unknown; and

"(3) In addition to the above, that the residence of such person is, either:

"(a) Unknown to the affiant; or

"(b) In some state or country other than the State of Florida, stating said residence if known; or,

"(c) In the State of Florida, but that he, (i) has been absent from the state for more than sixty days next preceding the making of the sworn statement, or (ii) conceals himself so that process cannot be personally served upon him, and that affiant believes that there is no person in the State of Florida upon whom service of process would bind said absent or concealed defendant."

11. § 48.08, Florida Statutes, 1951:

"48.08 Notice to Appear, Form.—Upon filing the sworn statement, and otherwise complying with the foregoing requirements, the plaintiff shall be entitled to have issued by the clerk or judge, not later than sixty days after the filing of the sworn statement, a notice to appear, which notice shall set forth:

"(1) The names of the known natural defendants; the names, status and description of the corporate defendants; a description of the unknown defendants who claim by, through, under or against a known party which may be described as 'all parties claiming interests by, through, under or against (name of known party)' and a description of all other unknown defendants which may be described as 'all parties hav-

ing or claiming to have any right, title or interest in the property herein described';

"(2) The nature of the suit or proceeding in short and simple terms (but neglect to do so shall not be construed as jurisdictional);

"(3) The name of the court in which the suit or proceedings were instituted and an abbreviated title of the case;

"(4) The description of real property, if any, proceeded against."

12. § 48.09, Florida Statutes, 1951:

"48.09 Notice to Appear, Return Day.—The notice to appear shall require the defendant to file an appearance in such proceeding on a day (which need not be a rule day), to be definitely fixed by said notice to appear, not less than twenty-eight nor more than sixty days from the date of the executing of the said notice to appear."

13. § 48.10, Florida Statutes, 1951:

"48.10 Notice to Appear, Publication, Proof and Recording Thereof.—(1) All such notices to appear shall be published once during each week for four consecutive weeks (four publications being sufficient) in some newspaper published in the county where the court is located, said newspaper to meet such requirements as may be prescribed by law for such purpose.

"(2) Proof of such publication shall be made by affidavit of either the owner, publisher, proprietor, editor, business manager, foreman or other officer or employee of such newspaper having knowledge of such publication, which affidavit shall set forth or have attached a copy of said notice, shall set forth the dates of each publication and otherwise comply with the requirements of law, and shall be recorded in the

chancery order book or minute book of the court wherein the suit or proceeding is pending, unless a certificate thereof be made as provided in § 48.12."

14. § 48.13, Florida Statutes, 1951:

"48.13 Notice to Appear, Mailing of.—If the residence of any defendant or other party to be served by publication shall be stated in the sworn statement with more particularity than the name of the state or country in which the defendant resides, the clerk, or the judge if there be no clerk of such court, shall mail a copy of such notice by United States mail, with postage prepaid, to each such defendant within ten days after the making of the notice, the date of mailing to be noted on the docket."

15. § 48.14, Florida Statutes, 1951:

"48.14 Time for Appearance, Decrees Pro Confesso and Default Judgments.—A defendant shall be required to enter his written appearance on the day fixed in the notice to appear and upon proof of publication or posting as prescribed by law a decree pro confesso or default judgment may be entered by the clerk at any time when any defendant is found to be in default for want of an appearance, which decree or judgment shall be recorded as are other orders."

16. § 59.08, Florida Statutes, 1951:

"59.08 Time for Taking Appeals or Filing Petitions for Certiorari.—Appeals, including petitions for review by certiorari, or proceedings in the nature of certiorari, shall be taken or filed within sixty days from and after the entry of the order, decision, judgment, or decree appealed from."

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Supreme Court of the United States

OCTOBER TERM 1964.

No. 363

LUCY C. SIMONS,

Petitioner,

vs.

MIAMI BEACH FIRST NATIONAL BANK, as Executor of the Estate of SOL SIMONS, Deceased,

Respondent.

PETITION FOR REHEARING

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PETITION FOR REHEARING.

Comes now the petitioner, LUCY C. SIMONS, and respectfully files this, her petition for rehearing from the opinions and judgment of the Court affirming the decree of the District Court of Appeal of Florida, Third District. It is urged that while the opinions are not all based upon the same theory, there is a fundamental error which goes to the correctness of each of the opinions which, if reconsidered, would call for a different conclusion.

Briefly stated, the error is that the opinion as announced does not take into consideration whether or not the prior separation decree of the Supreme Court of New York under the full faith and credit clause of the Constitution, Article IV, Section 1, and the statute adopted pursuant thereto, U. S. C. A., Title 28, §1737, voids the ex parte divorce decree in Florida of 1952, when it was based on identically the same grounds and facts upon which the issues were determined contrary to the husband's conten-

tion in the New York judgment. In the petition for certiorari which was granted, as shown on page "15" under the heading "REASONS FOR GRANTING THE WRIT", the first point was as follows:

> "The Courts of Florida have refused to give full faith and credit to the prior decrees of the State of New York in violation of Article IV, Section 1, of the United States Constitution."

The second point was as follows:

> "The Courts of Florida have denied to the widow, Lucy C. Simons, her constitutional property rights to which she was entitled under the laws of the State of New York by the mere subterfuge of an ex parte divorce case in the Courts of Florida, where the Florida Court did not have jurisdiction because of the lack of proper residence."

In support of the first point the petitioner relied upon the decision of this Court in the case of *Gene Durfee, ex ux., Petitioners,* v. *Julia E. Duke,* 375 U. S. 106, 84 S. Ct. 242, and the decisions relied upon by this Court in that opinion, particularly the case of *Sherrer* v. *Sherrer,* 334 U. S. 349, 68 S. Ct. 1090, 92 L. Ed. 1429.

With reference to the second point, to-wit: the residential and domicile status of Sol Simons in Florida in the spring of 1952, we pointed out (see page 16 of the petition for certiorari) that the lower Court, to-wit: the Circuit Court of Dade County, Florida, did not pass upon the validity of the domicile and residential facts appearing in the record in the 1952 divorce case in Florida, but that the opinion of the lower Court was predicated solely upon the application of the doctrine of the case of *Macfadden* v. *Muckerman* (Fla. App. 1959), 116 So. 2d 448, opinion by the District Court of Appeal of Florida, Third District.

From the mere reading of the opinion as reported it would appear that the Florida Appellate Court had held that the rule prohibiting any attack by a party to a divorce action in Florida for intrinsic fraud was applicable in a case where the defendant had appeared in the original litigation and contested the issue, as well as a case where a mere service by publication had been utilized. The lower Court placed that construction upon that case over the objection of counsel for petitioner that such a construction was erroneous and conflicted with the due process clauses. Actually the reported case, as set forth in the text at page 448, merely refers to the action to set aside the decree of divorce in the Circuit Court of Dade County, Florida on January 9, 1946. That divorce decree was filed in case No. 77430-A, in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, and the style of the case was *Bernarr Macfadden, plaintiff*, v. *Mary Macfadden, defendant*, and even though the suit was instituted and service was first obtained by service by publication, the defendant, Mary Macfadden, actually appeared in person and by and through an attorney, testified in the case and a final decree was entered granting the divorce after a thorough contest. Under those circumstances that opinion in the Macfadden case was correct in its conclusions, and on that principle would be sustained by the ruling of this Court in the case of *Sherrer* v. *Sherrer*, 334 U. S. 343, 68 S. Ct. 1087. In the *Sherrer* case, and we quote from 68 Supreme Court Reporter, at page 1093, this Court said:

> "It is one thing to recognize as permissible the judicial reexamination of findings of jurisdictional fact where such findings have been made by a court of a sister State which has entered a divorce decree in ex parte proceedings. It is quite another thing to hold that the vital rights and interests involved

> in divorce litigation may be held in suspense pending the scrutiny by courts of sister States of findings of jurisdictional fact made by a competent court in proceedings conducted in a manner consistent with the highest requirements of due process and in which the defendant has participated. We do not conceive it to be in accord with the purposes of the full faith and credit requirement to hold that a judgment rendered under the circumstances of this case may be required to run the gantlet of such collateral attack in the courts of sister States before its validity outside of the State which rendered it is established or rejected."

If we correctly construe this statement by this Court and its reference to and apparent approval of the cases set forth in the footnotes, then this Court has never held that where a service by publication has been used as a basis for an ex parte divorce decree attempting to bind a wife who has never left the state of the domicile, that she is forever barred from questioning that Court in a foreign state as to its jurisdiction to award a divorce a vinculo matrimonii and to annul any benefits which she has in a complete separation decree in the only state where the parties had ever been domiciles for matrimonial purposes, and where that separation decree was entered in a contested matter where both parties were before the Court. We will set out hereinafter certain features of the record which clearly show that the lower Court in dismissing the cause of action did so only on one point, and that is that under the *Macfadden* decision by the District Court of Appeal of Florida, Third District, Lucy C. Simons could not be heard to complain about the validity of the proceedings in Florida unless she could show extrinsic fraud.

The transcript of the printed record now before this Court, page 151, shows the position taken by Mr. Marion

E. Sibley, attorney for the respondent, on his motion to dismiss the petitioner's case before the Judge of the Circuit Court, and we quote:

> "Mr. Sibley: If your Honor please, as I stated at the outset, the question of residence is not involved in this litigation. The question of residence was involved in the original litigation, which was the divorce, in which the defendant was given an opportunity to defend and elected not to defend, in which the District Court of Appeals said the plaintiff has appealed from an order dismissing a bill of complaint in the nature of a bill of review to set aside a decree of divorce entered in the Circuit Court of Dade County, Florida, on January 9, 1946. The order dismissed the cause with prejudice and without leave to amend.
>
> Now, they allege in that case that Macfadden, during his life, had filed this suit, and they brought in afterwards where he had sworn he was a resident of New York and ran for some office up there during the period of time that he contended he was a resident of Florida. That case was dismissed, and the Court said in the case at bar, the appellant seeks to collaterally attack the decree some thirteen years after its rendition upon grounds which constitute intrinsic rather than extrinsic fraud.
>
> The rule is and has been that those issues that could or have been litigated in the proceedings themselves are not sufficient grounds to collaterally attack a decree which otherwise appears to be valid on its face. As opposed to intrinsic fraud, the bill of complaint does not, in our opinion, allege facts which would constitute extrinsic fraud such as the deceased husband's fraudulently keeping the appellant from defending the action, keeping her in ignorance of the proceedings, or other misconduct that would deprive the wife of an opportunity to have defended the action.

> Now, that brings us down to one point, only one point. Has the plaintiff, by her conclusive proof, or well nigh conclusive proof, convinced your Honor that the husband actually represented facts which prevented the wife and induced the wife not to defend, or is your Honor of the opinion that there were other advices given to her which caused her not to defend these proceedings, and upon which she relied that the divorce in Florida would not be recognized in New York?"

It is further reflected in the record and pointed out in the brief of the petitioner herein on the merits, wherein as shown in the record at page 209, in line with the position Mr. Sibley had taken as shown in the previous record on page 151, the lower Court confined its sole findings on the fact that the plaintiff had not shown that she had been lulled into inaction after she received notice of the 1952 Florida divorce proceedings. That was the only issue he mentioned (see Tr. 209):

> "They were dealing at arm's length. He was angry with her, because she had brought these proceedings to increase the alimony, and she had to have it done legally. But she had nothing done legally about stopping the divorce here.
>
> (p. 210) After she talked to him, she went to a man who said that the Florida divorce was no good. The attorney may have given her a false sense of security.
>
> From the evidence here, I do not think Mr. Simons did, and I discount her testimony as to their conversation. I do not think it is true."

Then in the final order of dismissal (see printed record in this Court, p. 315) the Court simply said that the Court adopts as its findings the observation made by the Court at the conclusion of the final hearing. The lower Court did

not make any finding upon the testimony that Mr. Simons was actually a resident and domiciled in Florida in 1952, sufficient to give the Florida Court jurisdiction to enter an ex parte divorce against his wife in New York. The lower Court did not even purport to pass upon the question of full faith and credit which had to be accorded to the prior proceeding and decree of separate maintenance in New York. The lower Court, to-wit: the trial Court, did not even mention or take recognition in any fashion of the effect of that decree in New York.

This Court in its several opinions by the various Justices has taken the position that counsel for the petitioner in the oral argument abandoned the claim which was set forth in Point II in the petition for certiorari. We have not been afforded the opportunity of actually having a transcript of the argument and, therefore, we can not question that something may have been said that would lead this Court to feel that the petitioner had abandoned that point.

We did and do now question the jurisdiction of the Florida Courts to have granted a valid divorce by ex parte proceedings in 1952. This point was made in the petition for certiorari and was followed by the argument in the printed brief of petitioner on the merits. We regret that there was anything said at the oral argument from which this Court could have based its finding and we respectfully urge that this case, involving as it does many important questions of law, should not be determined upon any such statements, but should be controlled by the record and the written petition for certiorari and the written briefs. The petitioner does not concede that the Florida ex parte divorce decree was valid and binding upon her. The decree in the lower Court, as we have above pointed out, did not pass upon this issue. The only finding as to juris-

diction is in the 1952 decree itself, based as it was wholly upon the substituted service by publication. This case should turn primarily in this Court on whether full faith and credit of the decree in New York in 1946 has been given by the Florida Court. We say that it was not, which we will attempt to demonstrate.

This Court many years ago in the case of *Adelaide M. Harding, plaintiff in error* v. *George F. Harding, defendant in error,* 198 U. S. 317, 25 S. Ct. 679, decided practically every point which is involved in the case at bar. In that case the wife filed a suit in Illinois for a separate maintenance decree based upon grounds for divorce, to-wit: cruel treatment and adultery by the husband. The husband, who was also living in Illinois in the City of Chicago, answered the complaint and denied the charges of cruelty and other misconduct and averred that the complainant was living apart solely through her own fault. The case went to issue and after extensive taking of testimony the Court there held for the wife and against the contentions of the defendant, the husband. The husband prosecuted an appeal to the Appellate Court of Illinois for the First District, but before the appeal was perfected, on August 31, 1897, he commenced in the Superior Court of San Diego, California, a suit against his wife for divorce. The plaintiff claimed that he had set up a residency in the State of California in 1895, which, according to the date set forth in the opinion, was approximately five years after this suit had been filed in the Circuit Court of Cook County, Illinois. The sole ground alleged by him for divorce was the wilful desertion by the wife in the month of February, 1890. The wife received notice of that suit and appeared in the California Court. Before the trial took place in California the Illinois Appellate Court had affirmed the Circuit Court of Cook County. The wife set forth in her answer the

decree in Illinois as amended by the opinion of the Appellate Court, but the California Superior Court found in favor of the husband, and upon appeal of that decree to the Supreme Court of California that Court affirmed the decree (140 Cal. 690, 74 Pac. 284).

This Court, in an opinion by Mr. Justice White, pointed out (see text, p. 683, 25 S. Ct.):

> "As we have said in stating the facts, after the bringing of the suit for separate maintenance, in which charges of the gravest character were made against the husband as to cruelty, adultery, etc., much testimony had been taken with regard to the charges. * * *"

Then the Court concluded (text, p. 686):

> "We are of opinion that the final decree of July 26, 1897, entered in the circuit court of Cook county, Illinois, in legal effect established that the separation then existing, and which began contemporaneously with the filing of the bill in that cause in February, 1890, was lawful, and therefore conclusively operated to prevent the same separation from constituting a wilful desertion by the wife of the husband. From these conclusions it necessarily follows that the issue presented in this action for divorce was identical with that decided in the suit in Illinois for separate maintenance. This being the case it follows that the supreme court of California, in affirming the judgment of divorce, failed to give to the decree of the Illinois court the due faith and credit to which it was entitled, and thereby violated the Constitution of the United States."

This decision in *Harding* v. *Harding*, to the best of our knowledge and after detailed research, has never been departed from by this Court, but has been followed in numer-

ous decisions by various other Courts. This decision, unless it should be reversed or receded from by this Court, conclusively determines that in the case at bar the Florida Court in this case erred in failing to give full faith and credit to the New York decree of separate maintenance.

The only point that is not squarely settled by the *Harding* case, *supra,* as applicable to this case, was whether assuming that the wife had not entered into the Superior Court of California at San Diego and set up that defense in that particular case, or whether she had refused upon advice to enter her appearance in that case in California, could she thereafter ever challenge the California decree.

Assuming that the California Court was at some time entitled to have the Illinois decree brought to its attention before it could be asked to give full faith and credit to it, just when is that time? This Court, and in turn the Florida Supreme Court in the case at bar and in other cases so far as we have been able to ascertain, has never passed upon that point. We think that is the sole question for determination by this Court in this case and that that was the controlling point which the petitioner raised for decision and determination by this Court on this petition for certiorari. Other Courts have passed upon that same situation in applying the doctrine of *Harding* v. *Harding, supra.*

In the case of *Bowen* v. *Bowen,* Supreme Court of Iowa, (Feb. 12, 1935), 258 N. W. 882, an identical situation as involved in the case at bar was presented. From the opinion it appears that Mr. and Mrs. Bowen had married at Rock Island, in the State of Illinois, on the 29th day of November, 1916, and they lived as man and wife at Rock Island until the 14th day of March, 1930, and at the time of this opinion in 1935 the wife still lived there. The opinion pointed out that some time prior to the month of March, 1932, the wife

filed in the State of Illinois an action against the husband for separate maintenance. The husband appeared in the case and filed a cross-complaint for divorce, and a decree was entered on the 2nd day of March, 1932. The Court dismissed the husband's cross-complaint for divorce on the merits and in the same decree granted a separation decree to the wife for separate maintenance on the ground that the husband had on March 4, 1930, without any reasonable cause, wilfully deserted and abandoned himself from the wife, and found that the husband was guilty of extreme and repeated cruelty as charged in the complaint. Shortly after that decree was entered the husband instituted an action for divorce in the State of Nevada and sought to get jurisdictiontion by publication of notice. The wife learned of that action and appeared in the Nevada Court and filed an answer setting up the decree in Illinois. On the 28th day of May, 1932, a decree was entered by the Court in Nevada dismissing the plaintiff's petition for divorce on the ground that the matters had been adjudicated by the decree in Illinois. About one year later, on March 30, 1933, the husband filed a petition against the wife in the District Court of Woodbury County, Iowa, and caused a notice to be published in the Sioux City Stylus, a newspaper published at Sioux City, Iowa. The wife did not appear, default was entered and a divorce granted to the husband. The divorce upon which the Iowa decree of divorce was granted found that the defendant in violation of her marriage vows and without any fault of the plaintff, wilfully deserted the plaintiff and has ever since absented herself from him without any reasonable or just cause, and also found cruel and inhuman treatment. Within a year after the entry of that decree the wife then filed a petition in that case and the question raised by the petition, as set forth in the opinion (258 N. W., text

884), was whether that divorce decree granted by the District Court of Woodbury County, Iowa should be set aside because of fraud practiced in obtaining it. The Trial Court refused to set aside the decree. An appeal was taken to the Supreme Court of Iowa. That Court reversed the lower Court. The Court said (see text, 258 N. W., p. 884, second column):

> "* * * the effect of the decree entered in the court in the state of Illinois granting the wife separate maintenance was to determine that the wife was entitled to a divorce from appellee, and, more particularly, that she was entitled to such divorce because the husband had deserted her on the 14th day of March, 1930, and on the further ground that he had treated her with extreme cruelty.
>
> In view of the fact that there had been an adjudication of the question of the husband's right to a divorce and that adjudication was binding on the district court of Woodbury county, Iowa, could the husband obtain a divorce there except by the practice of fraud?"

We quote further from page 885, first column:

> "No claim is made on behalf of the husband that the court was, in fact, advised as to these other adjudications. It is to be presumed that, if the court had been so advised, he would have done what an express provision of the Constitution of the United States (art. 4, §1) required him to do, give full faith and credit to the judgment entered by the court in the state of Illinois between these same parties with reference to this same issue, and would have therefore dismissed the husband's petition. The failure of the court to do that, therefore, must be held to be the result of the deception practiced upon it. That a failure to disclose in a hearing on a default divorce

case that there has been a prior adjudication of the issue has been held by this court to constitute such fraud in obtaining the decree as will require its being set aside on petition. See Wood *v.* Wood, 136 Iowa, 128, 113 N. W. 492, 12 L. R. A. (N. S.) 891, 125 Am. St. Rep. 223.

The husband's conduct in this case shows, not only that he perpetrated the fraud involved in the failure to disclose the prior adjudication, but that he deliberately planned an opportunity to do so. It will be noticed that, although the decree entered by the court in the state of Illinois was not entered until the month of March, 1932, another decree was entered between the same parties in Nevada in May of the same year. The only explanation offered of the possibility of the husband obtaining a residence in Nevada in time to start a suit which would go to final determination by May is that he left Illinois before the final decree was entered in that case. It will be noticed also that he started an action in Woodbury county, Iowa, in March, 1933. As a witness at the hearing on the petition for a new trial, he said he became a resident of Sioux City, Iowa, on March 15, 1932. It will be noticed that this was very shortly after the time the decree was entered at Rock Island and over two months before the decree was entered in the state of Nevada. * * * The husband, however, apparently anticipating an adverse decision as soon as the wife appeared, left Nevada and took up his residence in Iowa before the final determination of the case in Nevada. The husband knew that such adjudication was a bar to his right to obtain a divorce when he started his action in Woodbury county. He must have known, therefore, that his success in obtaining a divorce at Sioux City depended upon keeping the adjudication in the state of Illinois out of the record, and to that end preventing the wife from learning of the pendency of the action."

Then in concluding the opinion, the Court said this:

> "There is a suggestion in the findings of the trial court that the decree granting separate maintenance to the wife in Illinois and the decree granting a divorce to the husband in Iowa are not necessarily in conflict and that the two might exist together, and therefore the decree granting separate maintenance to the wife was not conclusive on the question as to whether the husband could properly obtain a divorce. In the first place, this leaves out of consideration altogether the part of the decree entered by the state court in Illinois dismissing the husband's cross-complaint for divorce as being without equity. In the second place, it does not give proper effect to the decree granting separate maintenance."

The Iowa Court in the *Bowen* case, *supra,* cited as one of its authorities a previous opinion by that Court in *Wood* v. *Wood,* 136 Iowa 128, 113 N. W. 492. In that case that Court held:

> "A decree in a divorce suit may be assailed the same as any other judgment where property interests are directly affected, and may be vacated after the death of the parties."

An analysis of the facts in that case from the opinion will disclose that an annulment had been entered in the District Court of Linn County, Iowa in a suit brought by B. H. Wood against his wife, Celista H. Wood; that these parties were married at a time when the wife was sane; that thereafter she became insane and while she was in the insane asylum B. H. Wood filed a suit to annul the marriage. Notice was served upon her guardian. That suit was dismissed, but then a second suit was brought through a different attorney, but is was not brought out by the guardian ad litem in the second suit that there had been a prior

adjudication on the same issue. The two proceedings were identical. A decree was entered granting the annulment of the marriage. Wood then remarried. Thereafter both B. H. Wood and his former wife, Celista, the insane party, died. In a suit filed by the heirs of Celista H. Wood it was charged that B. H. Wood was guilty of fraud in bringing the second suit and he had concealed from the Court the fact that on identical issues the relief sought had been denied and adjudged against him. The Court said in holding for the heirs and personal representatives of Celista H. Wood:

> "The only basis for the action, then, is the fraud alleged to have been practiced in obtaining the decree. The parties thereto are both dead, and their status while living is no longer a proper subject of judicial inquiry, save as it may affect the property rights of their heirs or survivors."

Under the law of Iowa there was a certain statute of limitations in which suits of this type could be filed. There is no question of full faith and credit involved in this particular case, but the case is authority for establishing the principle that concealment from a Court by a plaintiff of prior adjudication of the same subject matter which has been determined adversely to his contentions is a fraud practiced upon the Court. We have searched the authorities and the principles laid down by the Supreme Court of Iowa in the two cases above mentioned have not been reversed or overruled.

In the case of *Rice* v. *Rice*, 336 U. S. 674, 69 S. Ct. 751, decided about one year after the *Sherrer* case, this Court held that where no personal service in a Nevada action upon the wife, who was a resident of Connecticut, and she did not participate in the Nevada proceedings, she was not

precluded from bringing an action in Connecticut after her husband's death for declaratory judgment that the Nevada divorce was colorable and did not dissolve the marriage, and that she was not prohibited from challenging the finding of the Nevada Court that the husband was at the time of the divorce domiciled in Nevada. The husband died after the entry of the Nevada divorce, which was an ex parte divorce decree. After his divorce decree in Nevada the husband, Herbert N. Rice, remarried. Then he died. The wife in Connecticut brought a suit seeking a declaratory judgment that a decree of divorce entered against her and in favor of her husband by the Nevada Court was not entitled to full faith and credit. She joined as a party defendant the new wife and the administrator of Rice's estate. The purpose of the action was to determine the widowhood status of the parties and to decide questions concerning the inheritance of the property of the decedent, who died intestate. There were three dissenting opinions.

It is apparent that some of the Justices of the Supreme Court of the United States have been in disagreement, but we respectfully submit that all any attorney can do in representing his clients is to follow the majority opinions to the best of his ability. We submit that the case now before this Court is a much stronger situation than was involved in the *Rice* case. Let us suppose for the sake of argument that after the twenty years of married life of Mr. and Mrs. Rice in Connecticut, Mrs. Rice had applied for and received a separation decree based upon grounds for divorce which determined all of the issues between the parties as to the right to the separation and the wrongful action of the husband, but which left the then Mrs. Rice as the legal wife and the then Mr. Rice as the legal husband. What would have been the result in that case if in spite of that decree

Mr. Rice had then gone to Nevada and failed to disclose that decree in the Nevada proceedings? Would the Connecticut wife have been required to follow her husband into whatever state or territory of the United States he saw fit to sojourn, whether it be for thirty days or for years? None of the acts complained of in the Nevada Court ever took place while the parties were domiciled with a matrimonial domicile in Nevada. How could the Nevada laws be offended? Would the wife have the right to rely upon the fact that she and her husband had never been matrimonially domiciled in another state other than Connecticut? Was she entitled to rely upon the solemn declaration of the duly constituted Courts of Connecticut? Why should a default be placed upon the wife because she was derelict in her duty of following the husband wherever he saw fit to go? Why was it not the fault of the husband when he goes to another state and fails to disclose the fact of prior judicial determination? This Court in the *Rice* case recognized the inherent property rights of the wife, even though there had been no prior adjudication of separation in the Connecticut Court, and declared that she was still the wife and widow of the husband. That law is not unique and that is the law of New York.

The case of *In re Smith's Estate—Smith* v. *Bank of Jamestown*, Supreme Court, Appellate Division, Fourth Department, 243 App. Div. 348, 276 N. Y. S. 646, opinion rendered in 1935, held that under the statutes of New York where a decedent died after August 31, 1930, a surviving spouse had the right to elect to take against the will, notwithstanding that there had been a judgment of separation obtained by the wife. That Court held (see Headnote 2):

> "Judgment of separation obtained by wife did not dissolve marriage relation, but operated merely

as cessation of cohabitation, and did not deprive wife of privilege of election to take against husband's will."

In one of the concurring opinions comment was made that petitioner's counsel had not furnished to the Court any authorities to show what the wife's right would be in New York after the separation decree of 1946 had been entered in favor of Lucy C. Simons against her husband. We respectfully say that we did. Both in the petition for certiorari and in the brief on the merits counsel for petitioner discussed the case of *Vanderbilt* v. *Vanderbilt*, 54 U. S. 421, 77 S. Ct. 1360. The New York law is covered both in the majority opinion and in the dissenting opinions. As a result of the majority opinion this Court affirmed the opinion and judgment of the Court of Appeals of New York (1 N. Y. 2d 342, 135 N. E. 2d 553, 153 N. Y. S. 1), and a reference to that opinion, as well as the opinions of the lower Court and the Appellate Division, will clearly disclose that the basic law of New York was discussed and particular references were made to the Civil Practice Act, particularly Paragraph 1170A. We contend that there is no dispute either in the Florida law or in the New York law that a separate maintenance decree granted by the appropriate Court in either of the states does not terminate the marriage and that the relationship of husband and wife still continues.

The United States Court of Appeals for the Second Circuit in the case of *Legget* v. *Commissioner of Internal Revenue*, 329 F. 2d 509, a 1964 decision, analyzed the Florida law as to a separation, stating (see text, p. 511, first column):

"The essence of a legal separation is that each spouse may live apart free from any claim of desertion or demand for cohabitation by the other." Quoting

with approval Florida Supreme Court opinions of Anders *v.* Anders, 153 Fla. 54, 13 So. 2d 603, and Martin *v.* Martin, Fla. S. Ct., 66 So. 2d 268.

That Court said in speaking of the Florida separation proceeding (text, p. 511, ¶2):

> "A wife who has obtained a decree under §65.09 should stand in an even better position with respect to a claim of desertion against her arising out of her husband's subsequent offer of reconciliation; she not only had grounds for divorce but has had them adjudicated. In Naurison *v.* Naurison, 108 So. 2d 510 (Fla. D. C. App. 1959), the court provided for the right of the wife to live separate from her husband in a decree under §65.09; we think it was doing only what the statute itself established, since any decree under §65.09 would have this effect."

A similar finding with respect to a Nevada divorce decree and its application against a resident of the District of Columbia, which we think is quite applicable here, is in the case of *Ryan* v. *Ryan,* 139 F. Supp. 98, opinion by District Judge Youngdahl. In this case the wife had signed some kind of an instrument as a part of a separation agreement which granted a power of attorney for someone to appear for her in Nevada. After the decree of divorce was entered in Nevada the wife filed suit in the United States District Court for the District of Columbia, and that Court said that she had not made the type of an appearance in Nevada that would prevent her from making a collateral attack upon the validity of that decree, and held that the Nevada divorce was not binding and was not valid and entered the relief for the wife. This opinion was affirmed by the United States Court of Appeals, District of Columbia, on March 8, 1956, 230 F. 2d 838. In the order of affirmance and approving the disposition of the case by the United States District Court, the Court said:

> "In order to do so it was, of course, necessary to declare the foreign decree invalid."

The Florida Supreme Court has recognized the decision of this Court in *Harding* v. *Harding*, 198 U. S. 317, 25 S. Ct. 679, 49 L. Ed. 1066, as well as the other opinions of this Court on the same subject as to the full faith and credit which had to be given to a separate maintenance decree of another state. This is the case of *Field* v. *Field*, a 1956 decision, 91 So. 2d 640. The husband had sued in Dade County, Florida for a divorce. The Circuit Court granted a divorce, but the Supreme Court on appeal held that a prior New Jersey separate maintenance decree for the wife barred the husband's action for divorce. In the body of the opinion the Supreme Court of Florida said (see text, ¶1, p. 641):

> "The New Jersey final decree is a conclusive adjudication that the husband, and not the wife, was at fault in the separation of the parties which occurred in February, 1951." • • •
>
> "It is clear that the New Jersey court acquired personal jurisdiction of Field, and that the final decree is binding upon him." • • •
>
> (See text, p. 642, second column)
>
> "The New Jersey decree of separate maintenance bars relitigation of the question of who was at fault in the separation, and establishes that the wife is living apart from the husband under a valid and binding separate maintenance decree of the court."

Conclusion.

No one so far in this case has ever questioned the jurisdiction of the New York Supreme Court in granting the separate maintenance decree in 1946. None of the parties

to the case have questioned that if it was not for the Florida decree Lucy C. Simons would have been the wife of Sol Simons when he died in New York some years afterwards. The opposing party in this case has not claimed or even questioned the fact that the divorce grounds and evidence submitted in the Floriad decree were not identical with the same grounds and same facts upon which the New York decree had ruled adversely to the husband, Sol Simons.

We do not find any limitation in Article IV, Section 1, of the United States Constitution, which fixes any statute of limitations. We do not find any such limitation in the statute passed by Congress under the power granted in that constitutional provision, U. S. C. A., Title 28, §1738. There is no showing of any action by the petitioner which would create any estoppel. The petitioner did not remarry. The husband, Sol Simons, did not remarry. There has been nothing shown in this case to invoke any doctrine of equitable estoppel or the doctrine of laches. The rule in New York, if that is applicable, is set forth in the case of *Marsh* v. *Marsh*, Supreme Court, Queens County, 1944, 49 N. Y. S. 2d 769. In that case a suit was filed by the wife for a declaratory judgment determining the plaintiff's status as the defendant's wife. The husband had purportedly gone to Pennsylvania and obtained a divorce, but the Court found he never actually became a resident of such state but that he continued as a resident of New York, so that the Pennsylvania decree granting him a divorce was invalid and without legal effect in New York. The Court then held that under the laws of New York the statute of limitations is no defense to an action for declaratory judgment. The Court held that laches is not mere delay, but delay that works disadvantage or injury. In headnote "4" the Court said:

> "A divorce decree, which is invalid at time of its rendition, and second marriage, which is invalid when contracted, will not become legal and binding by passage of time as to innocent divorced wife solely because of her failure to bring such decree and marriage into legal question, as in action for declaratory judgment determining her marital status, as soon as she knew of or suspected such facts."

In Florida the Supreme Court of Florida in the case of *Chisholm* v. *Chisholm*, 125 So. 694, and in *Kelly* v. *Kelly* (S. Ct. Fla.), 75 So. 2d 191, which cases are referred to at page 329 of the printed record, the Supreme Court of Flordia held that an attack upon a decree of divorce in Florida may be made where there has been no change in the status of the parties of a character which would have resulted in injury, embarrassment or disadvantage to the husband.

We respectfully contend that the petitioner is entitled to a rehearing and re-argument of this case, if it meets with this Court's approval. If after full consideration of this petition this Court deems it advisable, it should announce a new principle of law that a binding and conclusive decree rendered by a competent Court in the state of the marital domicile places the burden upon a wife to follow the husband, whose rights are barred by the decree, into every other state or territory of the United States and actually enter that litigation in that state or states before that Court actually makes a decree in an ex parte divorce case. The Florida Court in the *Field* case, *supra*, has held that if there is such a binding decree of a sister state, the husband is barred from litigating that question anywhere else. If the husband is barred, then how can some other state give validity in the face of the constitutional prohibition? How can that state when a proper attack is made

refuse to set any proceeding contrary to that decree aside? That is only the first phase of the case. The other phase, which we have not abandoned, is that the Courts of Florida under these circumstances are required to hear and consider the question of the jurisdiction of this Court and the validity of the claimed residence or domicile of the husband. The decisions are apparently unanimous that even New York or any other state where the party resides could make such an attack, why would such an attack be barred in Florida where there is a direct attack made and that Court rejects the wife's rights and even refuses to consider the evidence as to domicile. These two phases are present and a solution by this Court of these two important points would be not only of benefit to the petitioner, but would be of great benefit to the Bench and Bar.

Respectfully submitted,

WILLIAM GRESHAM WARD,
Attorney for Petitioner, Lucy C. Simons,
1240 duPont Building,
Miami, Florida 33131.

The undersigned, WILLIAM GRESHAM WARD, one of the counsel of record for the petitioner, LUCY C. SIMONS, and who has signed the petition for rehearing submitted as above shown, hereby certificates that said petition for rehearing is presented in good faith and not for delay, in accordance with the requirements of Rule 58, of this Court.

DATED at Miami, Florida, this day of May, 1965.

WILLIAM GRESHAM WARD

Pursuant to the requirements of Rule 33, Rules of the Supreme Court of the United States, the undersigned, WILLIAM GRESHAM WARD, one of the counsel of record for the petitioner, LUCY C. SIMONS, hereby certifies that copies of the above and foregoing petition for rehearing in the above entitled case have been served upon Marion E. Sibley and Irving B. Levenson, counsel of record for the respondent, at their office at 605 Lincoln Road, Miami Beach, Florida 33139, by depositing three copies of the printed petition in the United States Post Office, with first class postage prepaid, addressed to the said Marion E. Sibley and Irving B. Levenson, at the address above set forth, which is their official post office address and place of business.

DATED at Miami, Florida, this day of May, 1965.

WILLIAM GRESHAM WARD